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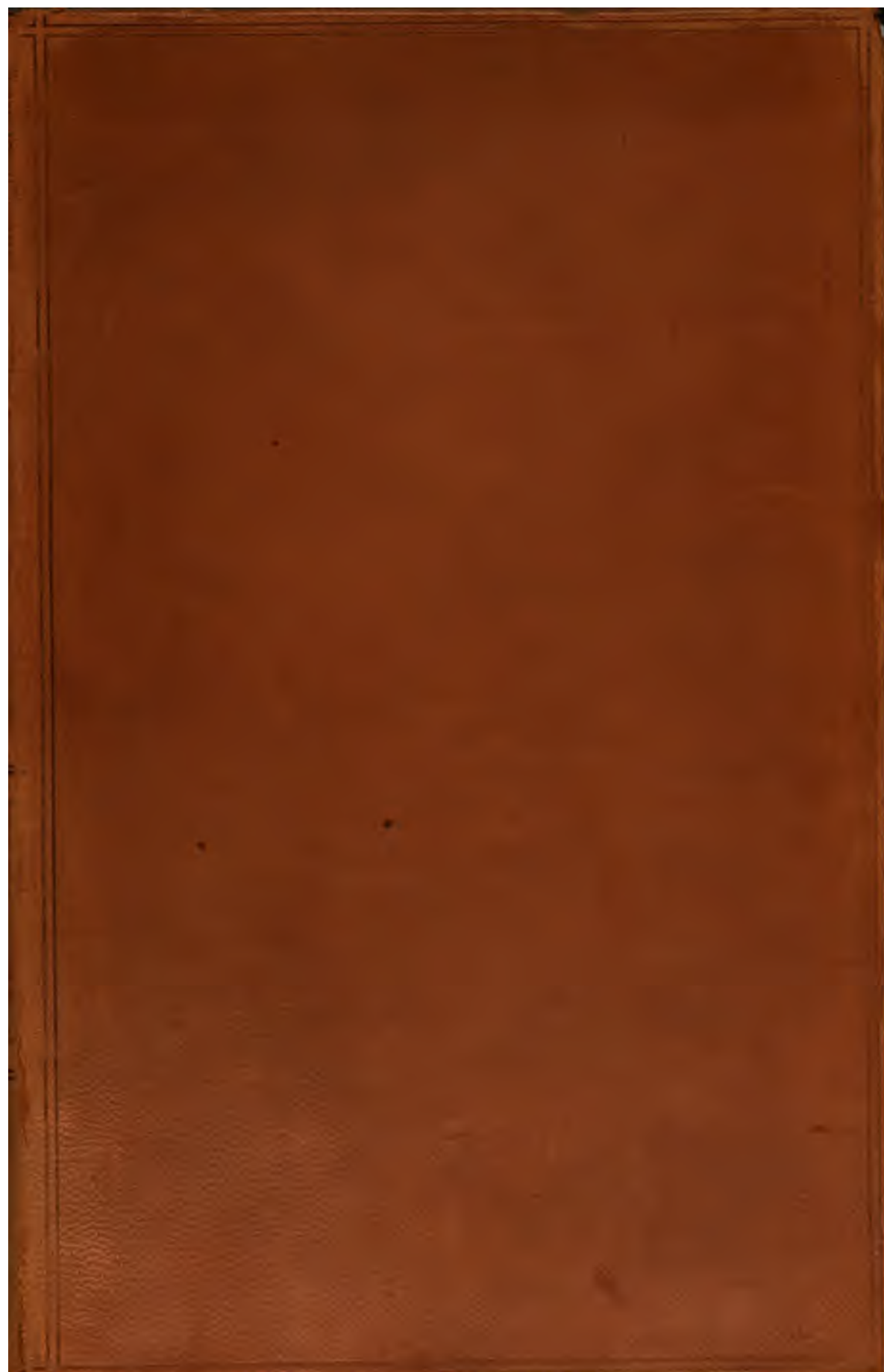
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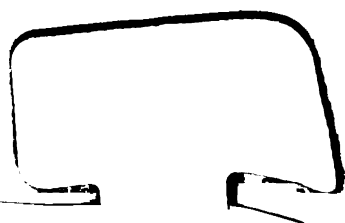
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BY  
JOSEPH A. JOYCE.

IN FOUR VOLUMES.

VOL. I.

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TO MY WIFE

M. E. J.

THIS TREATISE IS DEDICATED

AS A TRIBUTE TO HER CONSTANT ENCOURAGEMENT.



## PREFACE.

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IN the following volumes the writer has endeavored to give the profession not only a treatise, but a working book, which will meet the needs, lessen the labors, and save the time of all lawyers interested in questions relating to insurance, and to make it alike valuable to the practitioner who has access to large libraries and to the one who has not. The writer's experience in practice, coupled with what he has learned from judges and other members of the profession, convinced him that a work covering the whole law of insurances and its practice before the courts would be favorably received. He has, therefore, attempted to prepare a work presenting, in a carefully and systematically arranged form, the principles underlying adjudged cases, the facts to which such principles have been applied, and the opinions of courts and text-writers upon conflicting questions of law. Having this purpose in view, the writer in 1889 commenced collecting the necessary material, since which time no labor has been spared in critically examining the authorities, systematically arranging them with reference to their underlying principles, and in noting as briefly and concisely as has been deemed advisable the facts of such important cases as will show the application of the governing principle therein, and the grounds of the decisions. If for other reasons than

a conflict of authority it has been impossible to formulate any certain rule, the substance of the decision or decisions in point has been given. Where decisions have conflicted, the writer has endeavored to reconcile them and to state the weight of authority, and has called to his aid in numerous instances the opinions of other text-writers and of courts. It has not been the writer's plan to treat of the several kinds of insurances separately, but, on the contrary, to group decisions together with reference to the grounds on which the rulings have been based; where this has not been possible, owing to some technical doctrine peculiar to a particular kind of insurance, as in case of abandonment and constructive total loss in marine assurance, the subject has been treated separately under that heading to which it belongs. This arrangement has made it possible to cover all kinds of insurances, including mutual benefit insurance. Much time and labor has been expended in arranging alphabetically the sections of some chapters; but in no instance has this been done where it has not seemed more systematic, in view of the subject matter of such chapters, and better calculated to aid the practitioner by facilitating speedy reference. It is believed that no errors exist as to the authorities relied on, for they have not only been carefully selected and fully and conscientiously examined before and during compilation, but the citations made have also been verified from the completed manuscript. Every effort has been made to bring this work up to that standard which the technical character of the subject and the wants of the profession necessitate, and to make it one of value alike in the court room and the office. It is trusted that such effort has not been unsuccessful.

A succinct account of the origin and sources of in-

surances has been incorporated in the form of a "Preliminary Chapter." The adjudications have been brought down to the time of going to press, and cover not only those in this country, but also numerous English and Canadian cases. The writer has freely consulted the works of Emerigon, Marshall, Arnould, Duer, and others, and has carefully endeavored to give full credit to all from whom any information has been obtained. The writer also acknowledges his indebtedness to his brother, Mr. Howard C. Joyce, for assistance rendered during a part of the time. Credit is also due Mr. Howard K. James for aid in helping verify some of the citations; and the unfailing courtesy of Mr. James H. Deering and Mr. Lloyd Conkling of the San Francisco Law Library extended to the writer is acknowledged by him with great pleasure.

If the purpose of this treatise and the choice of the plan have been fortunate and the work is otherwise meritorious, the writer is content to leave it in the hands of the profession.

JOSEPH A. JOYCE.

SAN FRANCISCO, CAL., August, 1897.



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## TITLE V.

### INSURABLE INTEREST.

#### CHAPTER XXVII.

#### INSURABLE INTEREST.

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#### *SUBDIV. I. Attachment and Duration of Risk on Goods.*

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# TITLE I.

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## PRELIMINARY CHAPTER.

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# LAW OF INSURANCE.

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## TITLE I.

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### PRELIMINARY CHAPTER.

#### THE SOURCES AND ORIGIN OF INSURANCES.

- § I. Sources of insurance.
- § II. Origin of insurance generally.
- § III. Origin of marine insurance.
- § IV. Adoption of marine insurance in modern times.
- § V. Origin of the mutual insurance system.
- § VI. Origin of fire insurance.
- § VII. Origin of life insurance.
- § VIII. Origin of accident insurance.
- § IX. Origin of guarantee, fidelity guarantee, real estate title, etc., insurances.
- § X. Origin of other insurances.

§ I. Sources of Insurance. — The principal sources of insurance law are to be found in the marine law and the customs of merchants, to be collected from ancient and modern codes or ordinances of commercial law, elementary treatises on the subject in our own and foreign languages,<sup>1</sup> and the judicial decisions in the courts of this and other countries which follow the general marine law and the law of nations.<sup>2</sup> The origin of insurance, however, necessarily includes a reference to many of its sources, and we shall hereafter mention them in the consideration of that question. Whatever may have been the origin of insurance, this much is true, that it is to marine law and marine insurance that we

<sup>1</sup> For history of insurance treatises, see 3 Kent's Commentaries, 13th ed., \*342, 342, 487, \*487; 1 Duer on Insurance, ed. 1845, lect. ii, p. 45, et seq.; 1 Marshall on Insurance, 5th ed., 15, et seq.

<sup>2</sup> 1 Duer on Insurance, ed. 1845, 19, et seq.; 1 Marshall's Insurance, 5th ed., 13.

must look for a long period of time, especially in England, for the most certain developments of the system of insurance and the enunciation and regulation of the principles governing the contract. Justice Park, writing in 1796, says that where insurance is mentioned by professional men, marine insurance is meant.<sup>3</sup> Hopkins declares that the indemnity afforded by insurance was for a long period confined to the dangers of marine insurance,<sup>4</sup> while Walford asserts that it is admitted by all writers that maritime casualties were the first to which the principles of assurance, as distinguished from the mutual protection idea, were applied.<sup>5</sup> Other authors, writing on the subject, refer it to such sources, that it is through the medium of marine insurance that we must look for the fundamental principles governing the contract. Thus Emerigon declares<sup>6</sup> that "the ancient laws of the sea are the sources which are open to them, and the same whence they should draw who wish to recur to first principles"; and, he adds, that research into the antiquity of maritime jurisprudence is necessary, since many of the ancient doctrines, though now obsolete, are still the foundation of those now in force, and that it is difficult to comprehend many rules of the modern law without recourse to the ancient.<sup>7</sup> As to legislative action, or particular ordinances, Marshall says,<sup>8</sup> these have seldom gone further than to define and sanction those principles which were already received in all commercial countries; that some have added regulations dictated by national policy or particular interest, but these are disregarded elsewhere. Although the ordinances of other countries are not in force in England, or this country, they are of authority as expressing the usage of other countries upon a contract which is presumed to be governed by general rules that are understood to constitute a branch of public law.<sup>9</sup> Referring again to Emerigon,<sup>10</sup> he says that while the contract of insurance, and

<sup>3</sup> Park on Insurance, 4th ed., "Introduction," ii.

<sup>4</sup> Hopkins' Marine Insurance, ed. 1867, 47.

<sup>5</sup> Walford's Insurance Guide, 2d ed., 4.

<sup>6</sup> Emerigon on Insurance, Meredith's ed. 1850, xxxi.

<sup>7</sup> Id., xli.

<sup>8</sup> Marshall's Insurance, 5th ed., 13.

<sup>9</sup> Id.

<sup>10</sup> Emerigon on Insurance, Meredith's ed. 1850. 1

the mode of interpreting the obligations it involves, belong to the usage of mercantile places rather than to the civil law, or what was known to Blackstone and other English writers as municipal law, yet, "though it did not become, till very late, the special object of legislation, it is not the less regulated by the general principles of justice and equity that abide in the written reason of the law." He also declares that the contracts of maritime loan and insurance often depend on the same principles. This author,<sup>11</sup> and Marshall<sup>12</sup> both give an account of the various systems and progress of marine law promulgated by the different maritime states of Europe, state at about what period laws for the regulation of the contract of insurance first began to make a part of these systems, and show that the law of insurance is a branch of the law of merchants and the marine law.<sup>13</sup> The French writers also assert that marine insurance, in its essential principles and leading maxims, is a part of the law of nations;<sup>14</sup> to these may be added the authoritative statement of Blackstone, that in "all marine causes relating to freight, average, demurrage, insurance, bottomry . . . the law-merchant, which is a branch of the law of nations, is constantly adhered to," and that "there is no other rule of decision but this great universal law" (the law of nations), "collected from history and usage, and such writers of all nations as are generally approved and allowed of."<sup>15</sup> Flanders also declares<sup>16</sup> that the maritime jurisprudence of England is founded on the law-merchant, which is a branch of the law of nations. That the foregoing should be so is reasonable, since navigation is a state matter,<sup>17</sup> and necessarily all

<sup>11</sup> *Id.* xxxi, et seq., 19, et seq.

<sup>12</sup> *Marshall on Insurance*, 5th ed., 3, et seq.

<sup>13</sup> See, also, *Mr. Justice Bradley in Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1, 31, 34.

<sup>14</sup> *Emerigon on Insurance*, Meredith's ed. 1850, 19, et seq.; 1 *Duer on Insurance*, ed. 1845, 2.

<sup>15</sup> *Blackstone's Commentaries*, book iv, c. 5, 4 *Hammond's ed.* 1890, 89; *Id.*, *Chase's 2d ed.*, 880.

<sup>16</sup> *Flanders' Maritime Law*, ed. 1852, 26.

<sup>17</sup> *Emerigon on Insurance*, Meredith's ed. 1850, 4, 5. See, also, *opinion of Marshall, C. J.*, in *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 189, et seq.

maritime states would be interested in fostering and promulgating laws which would tend to encourage adventures at sea and commerce between nations. Justice Park,<sup>18</sup> referring, from the context, to 1756, asserts "that as there have been but few positive regulations upon insurances, the principles on which they were founded could never have been widely diffused nor very generally known"; that no question had arisen upon them in the superior courts; that, as late as the 30th and 31st Elizabeth, it became a question where an action upon a policy should be tried, and speaks of a certain case<sup>19</sup> as the most ancient one he had ever found on insurance. He further declares that, down to 1756, there were not more than sixty decisions upon insurance, and "even those cases which are reported are such loose notes . . . that little information can be gathered upon the subject," and Marshall<sup>20</sup> is an authority for the statement that insurance was little litigated in the courts of Westminster till toward the close of Elizabeth's reign, speaks of the decisions of the superior courts as of non-binding effect, and adds, that before the statute 43 Elizabeth, chapter 12, of date 1601, almost all disputes were settled by arbitration.<sup>21</sup> Such being the state of the law of insurance in England in 1756, Lord Mansfield, who in that year came to the bench, where he continued till 1788, had recourse to marine law foreign treatises and authorities, as well as to the customs and usages of merchants, for those leading principles upon which the English authorities then furnished little or no information. In writing of this learned jurist, Parsons says<sup>22</sup> that he set a wise example in this respect, and since then the jurisprudence of England and America has done little else than adopt the usage of merchants, and given it the force of authority.<sup>23</sup> As illustrations of the above we find that *Brough v.*

<sup>18</sup> See Park on Insurance, 4th ed., xliii, xliv, xlviii, xlix.

<sup>19</sup> Decided, 1588; 4 Inst. 142, cited in Dowdale's case, Coke's Rep., pts. 6, 46, 48.

<sup>20</sup> Marshall on Insurance, 5th ed., 16, 17, 19.

<sup>21</sup> See Maylnes' Lex Mercatoria, 106.

<sup>22</sup> Parsons' Marine Insurance, ed. 1868, 5.

<sup>23</sup> See Marshall on Insurance, 5th ed., 20; Flanders' Maritime Law, ed. 1852, 25.

Whitmore<sup>24</sup> refers to Lombard Street as giving a construction to policies of insurance, which the uniform practice of merchants and underwriters had made intelligible. So the Rhodian Laws, the Consolato del Mare, the laws of Oleron and Wisby, Roccus, and the Ordonnance of Louis XIV. (1681), are cited in *Luke v. Lyde*,<sup>25</sup> by Lord Mansfield. This case is cited in *Bork v. Norton*,<sup>26</sup> as are also the laws of Oleron; *Luke v. Lyde* is also cited in *The Saratoga*,<sup>27</sup> as are likewise Roccus, Straccha, Cleirac, Pothier, Emerigon, Valin; and the laws of Oleron, which laws are an authority in the decisions of *Walton v. Ship Neptune*,<sup>28</sup> and *Sims v. Jackson*,<sup>29</sup> and in *Davy v. Hallett*.<sup>30</sup> Kent, C. J., relies upon Emerigon, Valin, and Pothier. So in *Franklin Ins. Co. v. Lord*,<sup>31</sup> Story, J., says the doctrines of Valin, Pothier, and Emerigon are entitled to great weight and cites from Emerigon. Of the reports of Mason and Gallison, in which appear two of the above cases, Chancellor Kent<sup>32</sup> declares that they may fairly be placed upon a level with the best productions of English admiralty, for deep and accurate learning, as well as for the highest ability and wisdom in decision. So, in the *Star of Hope* the court, in discussing the question of general average, cites Emerigon.<sup>33</sup> Again, the Ordonnance of Louis XIV. (1681), and the commentary thereon by Valin, is referred to by the court in *Morgan v. The Insurance Company of North America*,<sup>34</sup> decided in 1806. It says: "These ordinances and the commentaries on them have been received with great respect in the courts both of England and the United States, not as containing any authority in themselves, but as evidence of the general marine law. Where they are contradicted by judicial decisions in our own country they

<sup>24</sup> 4 Durn. & E. 206-9 (1791).

<sup>25</sup> 2 Burr. 882, 889.

<sup>26</sup> 2 McLean (O. C.), 422, 426.

<sup>27</sup> 2 Gall. (O. C.) 164, 179.

<sup>28</sup> 1 Pet. Adm. (U. S.) 142.

<sup>29</sup> 1 Pet. Adm. (U. S.) 157.

<sup>30</sup> 3 Caines (N. Y.), 21.

<sup>31</sup> 4 Mason (O. C.), 248, 255.

<sup>32</sup> 3 Kent's Commentaries, 13th ed., \*20.

<sup>33</sup> *The Star of Hope*, 9 Wall. (U. S.) 203, 230, per Clifford, J.

<sup>34</sup> 4 Dall. (U. S.) 455, 458, per Tilghman, C. J.

are not to be respected, but on points which have not been decided they are worthy of great consideration. I am strongly inclined to adopt the rule laid down by Valin, because I think it reasonable." This case is cited on the point decided, on the above authorities, in *King v. The Delaware Insurance Company*.<sup>35</sup> In *Odlin v. The Insurance Company of Pennsylvania*,<sup>36</sup> the court says the opinions of French jurists on the question there under consideration had no inconsiderable weight with it, and although founded upon positive ordinances, yet they were evidence of the general law of merchants upon the subject, no judicial decision and no custom appearing to the contrary. "The sea laws and state ordinances of many of the maritime countries of Europe have, with some exceptions, gradually become incorporated with the commercial law of England by a kind of tacit adoption, and are in these cases considered as evidence of the customs of merchants. These regulations are used in the British and American courts, and have frequently furnished rules of decision where the positive law of the country or former decisions upon the point had not prescribed a different one." And the court refers to Roccus, Le Guidon, Valin, Emerigon, Pothier, and the Ordonnance of Louis XIV. So in *Hone v. The Mutual Safety Insurance Company*,<sup>37</sup> the court considers the Ordonnance de la Marine of Louis XIV., Valin, Emerigon, Boulay Paty, and Alauzet, upon the question of reinsurance. An examination of the insurance cases of England further shows that for the most part, certainly until comparatively recent times, they have concerned marine insurance;<sup>38</sup> and the earlier statutes of England, which legislate concerning insurance as such, relate to marine insurance. It is, therefore, these ancient usages and customs of merchants, digested and compiled into sea laws, ordinances, and treatises, which have furnished the leading principles for the adjudication of insurance cases, and which are the sources from which Lord Mansfield, Story, and other learned jurists, have drawn in the determination of marine cases of insurance,

<sup>35</sup> 2 Wash. (O. C.) 300, 307.

<sup>36</sup> 2 Wash. (O. C.) 312, 315.

<sup>37</sup> 1 Sand. (N. Y.) 137, 145.

<sup>38</sup> For cases down to 1795, see Beawes' *Lex Mercatoria*, 302, et seq.

and so marine law and marine insurance for a long period of time furnished the most certain developments of the principles governing the contract of insurance.

§ II. **Origin of Insurance Generally.**—The origin of insurance is wrapped in such obscurity that an exhaustive examination of the works of the most learned authors on this subject fails to discover the exact time when insurance was first known or practiced. Some of the most eminent writers contend that it was known to the ancients; others, that it had its inception in the necessities of maritime commerce, and the risks and hazards consequent thereon; although none of these fix definitely the date of its invention and first practice. It is, however, argued by other prominent writers that the present mutual insurance system had its origin in those artificial alliances or clubs, which are said to have existed from time immemorial for mutual benefit and assistance in different exigencies, in China, among the Teutons, the early Christians, and the ancient Greeks and Romans. That from these alliances or clubs sprang what were known as “guilds,” between which and the Friendly Societies of England, mutual benefit societies, and the mutual insurance system, the connection can be traced. There are certainly many points of resemblance between some of the alliances or clubs and the mutual insurance system, as will be noticed hereafter; and, if mutual insurance is a lineal descendant therefrom, then the date of the earliest existence and practice of insurance can be somewhat more definitely fixed than it can upon the theory that it owes its inception to maritime commerce. In view, then, of the preceding remarks, we will consider specifically the origin of the different kinds of insurance, placing marine insurance first, because the most replete references, legal and historical, are to that branch of the contract of true insurance, and also because that concrete idea known as marine insurance first took tangible shape, grew, and was more extensively known and practiced among nations than any other kind of insurance until, perhaps, recent times. We shall next consider the origin of the mutual insurance system, and follow with the origin of the several kinds of insurance in that order which their priority of existence, coupled with their



relative development and growth, as governed by the weight of authority, shall warrant.

§ III. **Origin of Marine Insurance.**—Whether insurance was used among the Romans is a disputed question, and one upon which there is no certain evidence. The principal arguments adduced in its favor are: 1. Passages from Livy<sup>39</sup> and Suetonius,<sup>40</sup> implying that the government of Rome, during the republic on two occasions, and the reign of the Emperor Claudius on one occasion, had assumed the risk of losses that might arise during the course of certain voyages, by storms or enemies; 2. That Cicero, in a letter written to the Proquaestor Caninius Sallust, at Laodicea, asks him to procure himself sureties for treasure he should be sending home;<sup>41</sup> 3. That the laws relating to usury in the Justinian code and pandects,<sup>42</sup> and elsewhere, specified the rate of interest granted to nautical insurance; 4. That the extensive use of bottomry and respondentia affords a strong presumption that insurance in its simpler forms was known and practiced among the ancients; 5. That the nauticum faenus, the trajetitia, or nautica pecunia, which were terms used to indicate a form of obligation connected with carriage by sea or marine adventure, wherein entered the element of risk, resembled insurance; 6. That the Romans possessed ships and commerce, and wherever foreign commerce was introduced some protection or security of the nature of insurance would be necessitated, especially in times of war, to encourage merchants to undergo the risks and hazards of adventures at sea; 7. That insurance, as a wager, was not unknown to the Romans; 8. That the above evidences, scattered through the Roman law and Roman history, if not sufficient in themselves, taken separately, are the several constituents which aggregated discover the existence among the Romans of the system of insurance. Opposed to these facts and the proposition they are advanced to prove are arguments to show: 1. That the passages from Livy and Suetonius have

<sup>39</sup> T. Livius, lib. 23, n. 49; lib. 25, n. 3.

<sup>40</sup> Lib. 25, n. 21.

<sup>41</sup> Cicero, lib. 2, epis. 17.

<sup>42</sup> Published respectively A. D. 529, 533.

no application to insurance; that the inference therefrom is that contractors were only to transport the stores purchased of them to their destination at the risk of the government, or, in other words, that the government became purchasers of the commodities or merchandise before embarked, and consequently the actual owner during the voyage; 2. That no inference is to be deduced from Cicero's letter in favor of the proposition, but that the reference therein has a much stronger affinity to bills of exchange than to insurance; 3. That the laws relating to usury in the code and pandects referred only to maritime interest, the consideration given in a bond of bottomry or hypothecation, and not to premium of insurance; 4. That *impignoratio* embraced what is known as bottomry, hypothecation, and *respondentia*; that the foundation of these was merely a loan or pledge, either personal or on property; 5. That *faenus nauticum*, *trajectitia*, or *nautica pecunia* were only payments for money advanced, or were terms used to indicate the loan, and as the creditor ran a risk during the voyage, and as the risks might apply to the ship or part of it, or to the cargo pledged for the payment of the debt, the rate of interest *nauticum faenus usurae maritimae* might be higher than ordinary; 6. That there is no evidence that any premium was paid in these transactions; 7. That ancient maritime commerce was limited and exposed to a paucity of risk, and that the navigation of the Romans was for war, and not for peace or commerce; 8. That insurance is not a wager, and the knowledge of wagers among the Romans would not imply a knowledge of insurance; 9. That there is no positive information, historical or otherwise, that insurance was in use among the Phoenicians, Carthaginians, or Greek republics, and that the Roman laws, the laws of Oleron, of Wisby, and of the Hanse Towns are silent as to insurance. It is also argued that Coke, in 1588,<sup>43</sup> notices the practice as a novelty. With some or all of the above affirmative facts as the principal basis, it is deduced that insurance existed among the Romans by Emerigon,<sup>44</sup> Bédar-

<sup>43</sup> Rep., pt. 6, pp. 46, 48.

<sup>44</sup> Emerigon on Insurance, Meredith's ed. 1850, xxxii. Emerigon, the French jurist, had a well-earned reputation for skill and learning in the maritime law, and his researches as to the origin and

ride,<sup>45</sup> Duer,<sup>46</sup> and others. Gibbon,<sup>47</sup> connects the usury laws with nautical insurance. Walford,<sup>48</sup> relying upon Hendriks,<sup>49</sup> does not go as far as Gibbon, but states that the contract of nautical interest or loan on bottomry or respondentia was used from very remote ages by the Greeks, Romans, and other nations as their ordinary insurance contract, and that it formed the traditionary groundwork of the insurance system, and this author quotes from Leybourn's *Parnarithmologia* that insurance was established by a law under Claudius Caesar; and Maylnes<sup>50</sup> declares Claudius "did bring in this most laudable custom of assurances." Among those who assert that insurance was unknown to the Romans, Hopkins<sup>51</sup> admits that the transactions relating to interest or usury and maritime loans, above mentioned, bore a resemblance to insurance in the introduction of risk as an element in the pretium or rate of interest. He also says: "Unquestionably within the compass of the Roman law and the details of Roman history may be found scattered the several constituents which, when built together, form the system of marine insurance." So, Marshall<sup>52</sup> also admits that the observation of Ulpian in the pandects gives color for insurance having been known among the Romans; that bottomry was a species of insurance, and was well understood by

law of insurance were laborious and exhaustive. In the early part of 1783 his work on "Marine Insurances" was published. "It is a work that has long been held in esteem in all commercial countries in Europe and America," says Meredith in the introduction to his edition of date 1850 of the work (p. xxix), and he adds (*Id.*, n. 1): "Estrangin (*Disc., prélim.*, p. 32) affirms that in France it is regarded as a sure oracle in the matter of insurance; that it is cited in the tribunals as an authority having the force of law. With the Italians it is held in the highest credit," and he also refers to other authorities which show the great value of the work. Valin, the commentator of the *Ordonnance de la Marine*, speaks of Emerigon's learning, and Justice Park (*Park on Insurance*, 4th ed., xv), refers to him as a distinguished writer, and he is cited as an authority in the courts both in England and this country.

<sup>45</sup> *Comm. de Code de Commerce*, sec. 1004.

<sup>46</sup> *Duer on Insurance*, ed. 1845, 7, et seq.

<sup>47</sup> *Decline and Fall*, Milman's ed. 1860, vol. 4, 368.

<sup>48</sup> *Walford's Insurance Guide*, 2d ed., 3.

<sup>49</sup> *Assur. Mag.*, vol. ii.

<sup>50</sup> *Lex Mercatoria*, ed. 1622, 146.

<sup>51</sup> *Hopkins' Marine Insurance*, ed. 1867, 6, 9, 10.

<sup>52</sup> *Marshall's Insurance*, 5th ed., 5, et seq.

them; and we would add that it is generally conceded that bottomry and respondentia were well understood by the ancients. The American Cyclopedia says it is possible that insurance was common among merchants centuries before it was recognized by law;<sup>53</sup> while Richards<sup>54</sup> declares that the practice of underwriting by individuals lays claim to great antiquity, although he adds that its origin is a matter of doubt. In answer to the negative argument of silence of the Roman laws and Roman jurists on this subject, Duer,<sup>55</sup> by an exhaustive course of reasoning, and Meredith<sup>56</sup> in an excellent short note, show that this argument is not conclusive, and that notwithstanding there is, says the former, a fair presumption, and the latter, an extreme probability, that insurance was known to the Romans. That insurance is of great antiquity is evidenced by the works of Bacon<sup>57</sup> and also by the preamble to the earliest English statute on insurance, of date 1601,<sup>58</sup> in both of which it is spoken of as a usage which had existed "time out of mind." In support of some or all the propositions for the negative above mentioned and of the claim that insurance was unknown to the Romans, are Marshall,<sup>59</sup> Park,<sup>60</sup> Hopkins,<sup>61</sup> Parsons,<sup>62</sup> and the American Cyclopedia.<sup>63</sup> Richards<sup>64</sup> says it is more probable it started in the 12th or 13th century. Hunter<sup>65</sup> speaks of maritime loans pecunia, trajectitia, and says Justinian fixes in them the maximum of interest. Ortolan<sup>66</sup> defines "trajectitia" or "nautica pecunia" as a loan or pledge during a voyage, and asserts that on account of the risk a higher rate of interest was allowed.

<sup>53</sup> 9 American Cyclopedia, 314.

<sup>54</sup> Richards on Insurance, ed. 1892, sec. 5, p. 5.

<sup>55</sup> Duer on Insurance, ed. 1845, 7, et seq.

<sup>56</sup> Emerigon on Insurance, Meredith's ed. 1850, xxxiii, n. a.

<sup>57</sup> Bacon's Abridgment, 4th ed., 598, 599.

<sup>58</sup> 43 Eliz., c. 12.

<sup>59</sup> Marshall's Insurance, 5th ed., 2, et seq.

<sup>60</sup> Park on Insurance, 4th ed., iii, et seq.

<sup>61</sup> Hopkins' Marine Insurance, ed. 1867, 2-16.

<sup>62</sup> Parsons' Marine Insurance, ed. 1868, 1, et seq. See 1 Parsons' Maritime Law, c. 1.

<sup>63</sup> 9 American Cyclopedia, 314.

<sup>64</sup> Richards on Insurance, ed. 1892, sec. 5, p. 5.

<sup>65</sup> Hunter's Roman Law, 472, note.

<sup>66</sup> Ortolan's Roman Laws, Mears' ed. 1876, 258.

The same author also says the Justinian code fixed the rate of interest for maritime loans,<sup>67</sup> and Justice<sup>68</sup> speaks of money lent to sea or upon the sea as *faenus nauticum*, *pecunia trajectitia*, *usura maritima*, and translates *faenus nauticum*, naval interest, and gives as a reason that "there seems to be such a difference between the *faenus nauticum* of the Rhodians and our bottomry that the latter would not be a proper term for the other." From an examination of the authorities and of the arguments on both sides we are inclined to the belief that there are many traces of the existence among the Romans of the contract of insurance, and we are more especially led to this conclusion by reason of the learning and laborious researches of Emerigon and the great value of his work on insurance, as also by the arguments adduced in favor of the proposition by Meredith, Duer, and others, as well as by the admissions of those of the opposite view. But we are unable to determine to what degree of perfection the system may have attained, or to conjecture that it existed in any, other than a most simple form, because of the absence of positive proof thereon.

§ IV. Adoption of Marine Insurance in Modern Times.

As to marine insurance in modern times; although there is no certain evidence as to the exact time and place of its adoption, nor as to the exact period of its introduction into the several countries of Europe, nevertheless it is generally agreed that the best evidences of its first recognition, or, as some writers say, of its invention, point to Italy and the latter part of the 12th or the beginning of the 13th centuries as the place and time.<sup>69</sup> So Emerigon<sup>70</sup> speaking of the *Ordonnance de la Marine*, says, "It was principally for the contract of insurance that the framers of the *Ordonnance* had recourse to the laws of the middle ages," etc. It is supposed by some that insurance was invented by the Jews, who found a refuge in Italy after their

<sup>67</sup> Id. 300, n. 1658.

<sup>68</sup> Justice's *Treatise on the Sea*, ed. 1705, iii, 259, and see Id. 255.

<sup>69</sup> Marshall's *Insurance*, 5th ed., 7, et seq; 1 Duer on *Insurance*, ed. 1845, 28; 9 *American Cyclopaedia*, 314; 1 *Parsons' Marine Insurance*, ed. 1868, 2.

<sup>70</sup> Emerigon on *Insurance*, Meredith's ed. 1850, xxxi.

expulsion from France by Philip Augustus, A. D. 1182,<sup>71</sup> and that the merchants in northern Italy saw its success and extended its use.<sup>72</sup> Justice Park,<sup>73</sup> however, says that if the Lombards were not the inventors, they were the first who brought the contract to perfection and introduced it to the world. But Emerigon<sup>74</sup> declares that it may be that the contract only from that time acquired a name and particular form, but that the policy or instrument is another matter from the contract. Hopkins<sup>75</sup> considers that the idea may not be rejected, but that it is conjectural only, and adds that it is possible the Florentines received the germ of the system from the Jews, although insurance was in general use in Italy, A. D. 1194, four years earlier than even the date of the Florentine republic, and Marshall<sup>76</sup> rejects the narrative as improbable. He further declares that the word "assecuratio" is a barbarism adopted in Italy about the 12th or 13th century. It also appears that the word "policy" or "polizza" is of Italian derivation, and signifies a note or memorandum in writing, or note or bill of security, creating an evidence of a legal obligation,<sup>77</sup> although Lord Mansfield declares that policy is derived from a French word which means a promise.<sup>78</sup> The Ordonnances of Wisby<sup>79</sup> are said to mention the contract of marine insurance.<sup>80</sup> As to

<sup>71</sup> Anderson fixes the date of banishment of the Jews as A. D. 1143; 1 History of Commerce, 82.

<sup>72</sup> 1 Duer on Insurance, ed. 1845, 33; Walford's Insurance Guide, 2d ed., 5, 6; Jacobs' Law Dictionary, title "Insurance."

<sup>73</sup> Park on Insurance, 4th ed., xxvii.

<sup>74</sup> Emerigon on Insurance, Meredith's ed. 1850, 2.

<sup>75</sup> Hopkins' Marine Insurance, ed. 1867, 17, et seq.

<sup>76</sup> Marshall's Insurance, 5th ed., 2, 3. See, also, Emerigon on Insurance, Meredith's ed. 1850, 10, 11.

<sup>77</sup> 1 Duer on Insurance, ed. 1845, 29; Angell on Fire and Life Insurance, 2d ed., 3, sec. 4; Marshall's Insurance, 5th ed., 228.

<sup>78</sup> Cited in Good v. Elliot, 3 Durn. & E. 703.

<sup>79</sup> "The Ordonnances made by the merchants and masters of the magnificent town of Wisby, a city of Sweden, in the Island of Gotland, formerly the most renowned fair and market in Europe, but at this day almost in ruins": Emerigon on Insurance, Meredith's ed. 1850, xxxviii.

<sup>80</sup> 9 American Cyclopedia, 314; Emerigon on Insurance, Meredith's ed. 1850, xxxviii, 160, n. b; Flanders' Maritime Law, ed. 1852, 21; Park on Insurance, 4th ed., xxxiii.

the date of these Ordonnances there is much doubt, one writer placing it as early as 1250.<sup>81</sup> Others declare that it is more ancient than the Consolato del Mare, which was recognized at Rome in 1075,<sup>82</sup> while some refer its date to a period near 1288, and others to a time anterior to or about 1320.<sup>83</sup> Marshall,<sup>84</sup> however, criticises Cleirac's version of the laws of Wisby, which version mentions insurance, and says Maylnes' translation does not mention it. He further asserts that the earliest ordinance on the subject of insurance is that of Barcelona, which he considers must have been published about the year 1435, differing herein from Emerigon,<sup>85</sup> who fixes its date as 1484. It is also said that a "Chamber of Assurance" was established in the city of Bruges as early as 1310.<sup>86</sup> Hopkins<sup>87</sup> cites Bédarride, commentator on the French Code de Commerce, as asserting that the insurance system "takes no place in legislature till the 14th century." While Duer<sup>88</sup> declares that no certain inference arises that the existence of insurance is owing to express legislation. An early document, of date 1411, refers to insurance as an established practice,

<sup>81</sup> 9 American Cyclopaedia, 314.

<sup>82</sup> But see Reynolds' Maritime Law, ed. 1852, 12, which asserts that the Spaniards claim paternity of the Consolato del Mare, and that it was promulgated in the Catalan tongue about the middle of the 13th century. Meredith, however, in his introduction to Emerigon's Insurance, ed. 1850, xiv, says that the oldest copy of this Ordonnance exists in the Catalan tongue, which is taken to be a translation from a long lost and unknown original, and that the age of the Ordonnance ranges from a period anterior to 1075 to 1150, or 1220; but Emerigon, who translated a large portion of it, says it was recognized as law in Rome in 1075. See also next note.

<sup>83</sup> Emerigon on Insurance, Meredith's ed. 1850, xxxv, xxxviii, 157, n. a. 160, n. b, and authorities cited; 9 American Cyclopaedia, 314; Flanders' Maritime Law, ed. 1852, 11, 12, 21, 28; 3 Kent's Commentaries, 13th ed., 13; Park on Insurance, 4th ed., xxxii, et seq; 1 Smith's Mercantile Law, Macdonell & Humphrey's ed. 1890, lxviii.

<sup>84</sup> Marshall's Insurance, 5th ed., 12, et seq.

<sup>85</sup> Emerigon on Insurance, Meredith's ed. 1850, xxxix; see Park on Insurance, 4th ed., xxxiv; Griswold's Fire Underwriters, ed. 1872, 10; 2 American Cyclopaedia, 303, 304; Walford's Insurance Guide, 2d ed., 8; 1 Smith's Mercantile Law, Macdonell & Humphrey's ed. 1890, lxviii.

<sup>86</sup> Richards on Insurance, ed. 1892, 6, sec. 5; Griswold's Fire Underwriters, ed. 1872, 10.

<sup>87</sup> Hopkins' Marine Insurance, ed. 1867, 19.

<sup>88</sup> 1 Duer on Insurance, ed. 1845, 33.

recites that a dangerous custom of the inhabitants and citizens of Venice to insure foreign vessels had been introduced, and prohibits such insurances.<sup>89</sup> Although Hopkins<sup>90</sup> asserts that the attempt is fruitless to ascertain the exact time when insurance was first introduced and practiced in England; although Anderson<sup>91</sup> and Maylnes<sup>92</sup> both declare that insurance was in use in England earlier than upon the Continent, and although Marshall<sup>93</sup> supposes that insurance must have been in use in that country long before the middle of the 15th century, yet we can safely say that the most certain indications of its first use in England point to its introduction there by the Lombards or Italians from Lombardy, who settled in London somewhere about the 13th century.<sup>94</sup> And in this connection it is noted that policies issued at Antwerp in 1620 refer to insurances made in Lombard Street, London.<sup>95</sup> In view of the above facts it can be reasonably concluded that marine insurance came into general use as a system or contract as early as the 12th or 13th centuries, although there is much which points to an anterior date for its existence and use. Passing over the growth of insurance in other foreign countries, except to notice that the Ordonnance of Louis XIV., established in 1681, contains lengthy regulations concerning insurances, as does also the Guidon de la Mer, of date somewhere between 1556 and 1584,<sup>96</sup> we find in England that in 1512 a Venetian merchant

<sup>89</sup> Hopkins' Marine Insurance, ed. 1867, 20.

<sup>90</sup> Id. 28.

<sup>91</sup> 2 History of Commerce, 109, 203.

<sup>92</sup> Maylnes' Lex Mercatoria, 105.

<sup>93</sup> Marshall's Insurance, 5th ed., 7.

<sup>94</sup> Angell on Fire and Life Insurance, 2d ed., 4, sec. 4; Maylnes' Lex Mercatoria, ed. 1622, 146; 1 Duer on Insurance, ed. 1845, 33; Griswold's Fire Underwriters, ed. 1872, 13; Park on Insurance, 4th ed., xlii. See Marshall's Insurance, 5th ed., 6, 7; 1 Smith's Mercantile Law, Macdonell & Humphrey's ed. 1890, lxviii.

<sup>95</sup> Walford's Insurance Guide, 2d ed., 5; Griswold's Fire Underwriters, ed. 1872, 13; see, also, Justice's Treatise on the Sea, ed. 1705, appendix and forms; Angell on Fire and Life Insurance, 2d ed., sec. 4; 1 Duer on Insurance, ed. 1845, 33.

<sup>96</sup> Of date 1578, says Griswold: Griswold's Fire Underwriters, ed. 1872, 9. Written not long before the 15th century, says Marshall: Marshall on Insurance, 5th ed., 15. While Meredith fixes the date somewhere between 1556 and 1584; Emerigon on Insurance, Meredith's ed.



effected insurance there on property from Candia, capital of the island of Crete; that in 1548 and 1558 insurance is mentioned in England;<sup>97</sup> that in 1560 or 1561 Guicciardini, an Italian historian, speaks of the commerce between England and the Netherlands, and the insuring their merchandise from losses at sea.<sup>98</sup> The earliest English statute on insurance is the 43 Elizabeth, chapter 12, of date 1601, by virtue of which commissioners consisting of the judge of admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight merchants, or any five of them, were appointed to hear and determine causes arising upon policies of assurance in the city of London. The powers of these commissioners were, however, so limited and the statute so defective, that the act 13 and 14 Car. II., chapter 23, was passed in 1662, enlarging their powers and otherwise attempting to remedy the defects of the prior enactment. But a judgment of the commissioners was held no bar to an action at law;<sup>99</sup> "prohibitions to restrain them were issued and the court fell into disuse."<sup>100</sup> The statute 6 George I., chapter 18, of date 1719, under pretense of remedying certain alleged evils arising by reason of "many particular persons," insurers, becoming bankrupt and otherwise failing to meet their losses, granted to two companies the monopoly of marine insurance and lending money on bottomry. The statute did not extend to private persons, and also contained some other exceptions. However, the statute 5 George

1850, 157, n. a. For a translation of the sea laws of the Rhodians, the Romans, of Oleron, of the Hanse Towns, and the sea laws of the French of 1681, see Justice's *Treatise on the Sea*, also Maylnes.

<sup>97</sup> Walford's *Insurance Guide*, ed. 1867, 5; Richards on *Insurance*, ed. 1892, sec. 5.

<sup>98</sup> 1 Parsons' *Marine Insurance*, ed. 1868, 10; 2 Anderson's *History of Commerce*, 108, 109; Hopkins' *Marine Insurance*, ed. 1867, 29. See Marshall's *Insurance*, 5th ed., 7.

<sup>99</sup> *Carne v. Moye*, 2 Sid. 121 (1658); 3 Blackstone's *Commentaries*, c. vi, 75, Hammond's ed. 1890, p. 102.

<sup>100</sup> 1 Smith's *Mercantile Law*, Macdonell & Humphrey's ed., 1890, lxi; 4 Bacon's *Abridgment*, 4th ed., 251; *Bendy v. Oyle*, Sty. 166, 172 (1649), case of life assurance. Prohibition granted to court of assurance on ground that it had jurisdiction only of such contracts as related to merchandise: *Dalbye v. Proudfoot*, 1 Show. 396 (1692). Rule to show cause why prohibition should not be granted was issued: *Park on Insurance*, 4th ed., xlii, xlv, xlviii.

IV., chapter 114, of date 1824, repealed so much of the prior act as restrained other corporations from underwriting, but did not otherwise abridge the rights or privileges of the two companies which had been enlarged by other enactments, especially that of the 11 George I., chapter 30, of date 1724, by virtue of which the right to plead the general issue was granted.<sup>101</sup> This privilege would, however, seem to be impliedly abrogated, or at least so far abrogated as to be of little or no practical value by the changes resulting in the present system of pleading in England.<sup>102</sup> The other statutes affecting these companies were those of 7 George I., chapter 27, passed in 1720, and that of 8 George I., chapter 15, enacted the next year under the first of which a large proportion of the sum which each company had agreed to pay was remitted each company, and under the latter they were excepted from liability to certain costs and damages. In 1746, the statute 19 George II., chapter 37, provided that any insurance made on ships or on "any goods, merchandises, or effects laden, or to be laden, on board any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer," should be void, with certain exceptions. This act further prohibited reinsurance, unless the insurer be insolvent, become a bankrupt, or die. In 1864 the 27 and 28 Victoria, chapter 56, amended the last act by providing that reinsurance of sea risks might lawfully be made.<sup>103</sup> Passing from these statu-

<sup>101</sup> See *Carr v. Royal Exch. Assur. Co.*, 31 L. J. Q. B. 93; 1 Best & S. 956.

<sup>102</sup> See 5 and 6 Vict., c. 97, sec. 3, and Judicature Acts.

<sup>103</sup> The insurance statutes in force in 1889 in England were: 1745-46 (E. S.), 19 Geo. II., c. 37 (marine); 1774 (E. S.), 14 Geo. III., c. 48 (life); 1774 (E. S.), 14 Geo. III., c. 78, sec. 83 (fire); 1787-88 (E. S.), 28 Geo. III., c. 56 (marine); 1854-55, 18 & 19 Vict., c. 119, sec. 55 (emigration); amended, 26 & 27 Vict., c. 51; 35 & 36 Vict., c. 73; 36 & 37 Vict., c. 85; 38 & 39 Vict., c. 66; 39 & 40 Vict., c. 80; 1862, 25 & 26 Vict., c. 63, sec. 55 (merchant shipping); 1866 (I.), 29 & 30 Vict., c. 42 (life); 1867, 30 & 31 Vict., c. 23 (inland revenue); 1867, 30 & 31 Vict., c. 144 (assignment of life); 1868, 31 & 32 Vict., c. 86 (marine); 1870, 33 & 34 Vict., c. 97 (stamps); 1876, 39 & 40 Vict., c. 6 (marine); 1880 (S.), 43 & 44 Vict., c. 26 (life, married women); 1881, 44 & 45 Vict., c. 12, sec. 44 (inland revenue); 1881 (E. I.), 44 & 45 Vict., c. 41, sec. 14 (fire); 1882 (E. I.), 45 & 46 Vict., c. 75, sec. 11 (married women's prop-

tory regulations in England to the adjudicated cases, we find in that country no reported decision prior to 1588,<sup>104</sup> and the number of cases down to the middle of the 18th century are comparatively few.<sup>105</sup> A consideration of the origin of marine insurance would not be complete without a mention of Lloyds, which may be referred in the beginning to the date 1710,<sup>106</sup> since in that year Lloyd opened a coffeehouse in Abchurch Lane, London, which became the resort for underwriters and merchants, marine insurance having been carried on for a long time prior thereto by individual merchants,<sup>107</sup> in Lombard Street. The name "Lloyds," therefore, was identified with the underwriters and insurance, and so became known throughout the insurance world. The name had become so attached to the house as a resort of underwriters that it clung to them when they removed in 1774 to the Royal Exchange, where, with the exception of a period from 1838 to 1844, they permanently located an office for carrying on their business. This society was incorporated by an act passed in 1871.<sup>108</sup> Their affairs are managed by a committee appointed from their members, which appoints agents who are located in all the principal ports of the world. It is the duty of these agents to keep the society constantly informed of all matters of importance relating to the departure and arrival of ships, losses, casualties, and the like, and from these accounts forwarded by the agents and posted up in the private room at Lloyds, and known

erty); 1884, 47 & 48 Vict., c. 62, secs. 8, 11 (marine, life); 1887, 50 & 51 Vict., c. 15, secs. 5, 6 (marine); 1889, 52 & 53 Vict., c. 42, sec. 20 (accident). See, also, Act 1892, 55 Vict., c. 39: From Chronological Table and Index, Statutes, 11th ed., title "Insurance."

<sup>104</sup> 4 Inst. 142; cited in Dowdale's case, Coke's Rep., pt. 6, 46, 48.

<sup>105</sup> See Park on Insurance, 4th ed., xliii.

<sup>106</sup> Richards (Richards on Insurance, ed. 1892, sec. 10), says Lloyds was started in latter part of 17th century.

<sup>107</sup> As to insurance being carried on by individuals, see Richards on Insurance, ed. 1892, sec. 5, pp. 5, 7; Griswold's Fire Underwriters, ed. 1872, 11, 35; 13 Encyclopedia Britannica, 180; Hopkins' Marine Insurance, ed. 1867, 32; Reynolds' Life Insurance, ed. 1853, 3. But the statute of 1719, 6 George I., chapter 18, would warrant the inference that corporations had carried on insurance as a business long before its date, although Walford (Insurance Guide, 2d ed., 10) speaks of the two companies as the first marine corporations.

<sup>108</sup> 34 Vict., c. 21; see, also, schedule of act for rules of society.

as "Lloyd's Written Lists," are methodically compiled what are known as "Lloyd's Books," one of which is placed in the public room at Lloyds. The "Written Lists" are printed and filed, and are known as "Lloyd's Printed Lists."<sup>109</sup> We have traced, so far as the main facts enable us, the origin of marine insurances, as well as its adoption in modern times down to the date of the earliest reported English case, also to that of the earliest English statute, mentioning, in addition, some later statutes relating to the subject, together with a brief mention of some other facts bearing upon its growth in that country. From these dates the sources of the law are easier of access to those who wish to recur to principles, and will be referred to hereafter, as far as necessary in treating of the law governing the contract.

**§ V. Origin of the Mutual Insurance System.**—The mutual insurance system is claimed to be of very ancient origin. This claim is based upon the assumption that there is an analogy between it and the Friendly Societies of England; that between the latter and guilds there is a great similarity, and, to go one step farther, the origin of guilds is attempted to be traced to those artificial alliances or clubs which existed in ancient times, in China, among the Teutons, the German tribes of Scandinavia, the ancient Greeks and Romans, and the early Christians, for mutual protection and assistance in various exigencies, and for other purposes. The effort, however, to discover the origin of guilds, as well as of the word "guild" itself, has been productive so far only of disagreement.<sup>110</sup> It is not

<sup>109</sup> 1 Parsons' Marine Insurance, ed. 1868, 12; Hopkins' Marine Insurance, ed. 1867, 33; Richards on Insurance, ed. 1892, sec. 6; Griswold's Fire Underwriters, ed. 1872, 14, et seq., 10; 1 Arnould on Marine Insurance, Perkins' ed., 1850, 83, 84, \*82, \*83, sec. 50; Id., MacLachlan's ed. 1887, 148-51; 14 Encyclopedia Britannica, 9th ed., 741, title "Lloyds"; Century Dictionary, 3490, "Lloyds."

<sup>110</sup> Lambert's Two Thousand Years of Guild Life; and see bibliographic note appended thereto; 11 Encyclopedia Britannica, 259, "Guilds"; 9 Id. 780, "Friendly Societies"; Brentano on Guilds and Trades Unions; Old Guilds and New Friendly Trades Societies, 6 Fortnightly Review, N. S., Oct., 1869, p. 391; Workmen's Benefit Societies, Quarterly Review, Oct. 1864, p. 318; Bacon's Benefit Societies and Life Insurance, ed. 1888, sec. 10; Walford's Insurance Guide, 2d ed., 3.

necessary, though, to inquire here as to the origin of guilds or of the word "guild." It is sufficient that the essence of the guild was mutual protection or benefit, social, political, or pecuniary. We may also note that guilds are said to be mentioned in the laws of Ina and Alfred.<sup>111</sup> While Brentano<sup>112</sup> speaks of the guilds shown by the *Judicia Civitatis Lundoniae*, the statutes of the London guilds reduced to writing in King Athelstan's time,<sup>113</sup> and says one might call these guilds "assurance companies against theft," owing to their regulations against violence, especially of theft; and guilds have also been defined as "the mutual assurance societies of the poorer classes."<sup>114</sup> The *Fortnightly Review*<sup>115</sup> states that the "Fraternitie," or "Bretherede," of "St. James at Garlekhith, London," begun in 1375, provided for relief in sickness, for old age, for burial, arbitration clauses, and relief under false imprisonment. The same author<sup>116</sup> asserts that "the whole vast group of Friendly Societies scarcely looks back beyond the first act which authorized the formation of such bodies toward the close of the last century, 1793,<sup>117</sup> and if the existence of a Friendly Society here and there can be established in the earlier years of the century, it is reckoned a matter worthy to be recorded." Notwithstanding this assertion, there is authority for stating that the system of Friendly Societies in England may be traced to within a few years of the suppression of religious guilds in the 16th century, since the last recorded guild was in 1628, and Friendly Societies existed in 1634, and although there is no directly connecting link between the two,

<sup>111</sup> Ina, Ini, or Ine, 688 A. D. to 726 A. D.; Alfred, 871 A. D. to 901 A. D. See Lambert's *Two Thousand Years of Guild Life*, 43; Walford's *Insurance Guide*, 2d ed, 3.

<sup>112</sup> Brentano on *Guilds*, etc., 11.

<sup>113</sup> 925 A. D. to 941 A. D.

<sup>114</sup> Bacon's *Benefit Societies and Life Insurance*, ed. 1888, sec. 10.

<sup>115</sup> Vol. 6, N. S., or Vol. 12, O. S., Ludlow's article on *Old Guilds*, etc., Oct. 1869, p. 394.

<sup>116</sup> Id. 391. See article by same writer on *Guilds and Friendly Societies*, 21 *Contemp. Rev.* 553, 737.

<sup>117</sup> The act was 33 Geo. III., c. 54; repealed 1855, 18 & 19 Vict., c. 63, sec. 1; latter act repealed 1875, 38 & 39 Vict., c. 60, sec. 5, but see sec. 7; this act amended 1876, 39 & 40 Vict., c. 32; last act repealed 1887, 50 & 51 Vict., c. 56, sec. 17.

yet it may reasonably be believed that the latter are an outgrowth of the former.<sup>118</sup> The purpose of Friendly Societies under the English Insurance Corporation Act of 1892 was mainly by voluntary subscriptions, with or without donations, for relief in sickness or other infirmity, in old age, widowhood, or orphanhood, for payments on birth or death, for payments in distress, to seekers for employment, and in case of damage or shipwreck at sea, for endowments and for insurance of tools against fire, and these societies include under the act every such corporation not required by law to be licensed for the transaction of insurance, and if the contract it offers to undertake is a contract of insurance, the society is an insurance corporation.<sup>119</sup> Numerous acts have been passed in England containing provisions in relation to these societies.<sup>120</sup> In so far, then, as the object of guilds and Friendly Societies is mutual benefit and assistance, pecuniary and otherwise, there are many points of resemblance in them to the mutual insurance system, even if there were no other connecting link. Taking this analogy as a basis, then, upon the question of priority be-

<sup>118</sup> 9 *Encyclopedia Britannica*, 780, "Friendly Societies"; see, also, 6 *Ludlow on Old Guilds and New Friendly Trade Societies*, *Fortnightly Review*, N. S., Oct. 1869, p. 391; *Workmen's Benefit Societies*, *Quarterly Review*, Oct. 1864, p. 318; 16 *Am. & Eng. Ency. of Law*, 19; *Bacon on Benefit Societies and Life Insurance*, ed. 1888, 16, 17.

<sup>119</sup> Act 1892, 55 *Vict.*, c. 39; *Hunters' Insurance Corporation Act*, 1892, 12, 13.

<sup>120</sup> The following acts relating to Friendly Societies were in force in 1889: (1833) 3 & 4 *Will. IV.*, c. 14, sec. 25; (1854) 17 & 18 *Vict.*, c. 56; (1860) 23 & 24 *Vict.*, c. 137; (1863) 26 & 27 *Vict.*, c. 87, secs. 60, 68; (1870) 33 & 34 *Vict.*, c. 61, sec. 2; (1875) 38 & 39 *Vict.*, c. 60; (1877) 40 & 41 *Vict.*, c. 13, secs. 16, 17; (1882) 45 & 46 *Vict.*, c. 72, sec. 21; (1883) 46 & 47 *Vict.*, c. 47; (1884) 47 & 48 *Vict.*, c. 43, sec. 4; (1887) 50 & 51 *Vict.*, c. 56; (1888) 51 & 52 *Vict.*, c. 15, sec. 6; (1889) 52 & 53 *Vict.*, c. 22. Acts were also passed in 1819, 1829, 1834, 1846, 1850, 1855 and 1876. These acts, from 1819 to 1850, inclusive, as well as the act of 1793 (already noted), were repealed by act of 1855 (18th & 19th *Vict.*, c. 63, sec. 1), but as to acts of 1829 and 1834, see 17 & 18 *Vict.*, c. 56, and 6 & 7 *Will. IV.*, c. 32 (1836), and as to acts of 1846 and 1850, see 17 & 18 *Vict.*, c. 56. The act of 1855 was repealed by act of 1875 (38 & 39 *Vict.*, c. 60), which was amended in 1876 by 39 & 40 *Vict.*, c. 32, which in 1887 was repealed by 50 & 51 *Vict.*, c. 56, sec. 17; *Chronological Table and Index of Statutes*, 11th ed., title "Friendly Societies." See, also, *Bunyon on Insurance*, ed. 1854, 176, 177.

that a vast commerce existed between England and the Netherlands, and that the merchants had "fallen into a way of insuring their merchandise from losses at sea by joint contribution." This passage is cited by Anderson and also by Hopkins, who speaks of it as being a meager account of insurance.<sup>128</sup> Justice Bradley<sup>128a</sup> says the earliest form of the contract of insurance was that of mutual insurance. Griswold<sup>129</sup> says mutual insurance was earliest in use,<sup>130</sup> and Richards<sup>131</sup> asserts that back in Anglo-Saxon times there is evidence of attempts among friendly guilds to guarantee protection against fire and other calamities by mutual contribution,<sup>132</sup> and that in 1710 the earliest mutual and stock company was organized in London.<sup>133</sup> Other companies had, however, formed prior thereto on the mutual plan; thus, in 1686, the "Friendly Society for Insuring Houses from Fire" was formed; in 1696 the "Amicable Contribution for the Assurance of Houses and Goods from Fire" was organized, and the policy of this company is said to contain the germ of perpetual insurance, and to throw some light upon the decisions of the courts upon successive losses,<sup>134</sup> and in 1706 the "Amicable Society for a Perpetual Assurance Office," a life company, was founded. The scheme was mutual, and provided for a fixed rate of contribution, which was the same for all members, the ages of whom were limited from twelve to fifty, afterward changed to forty-five, and a certain sum was distributed each year among representatives of deceased members. The plan was, however, changed in 1734, so as to fix more definitely the sum to be paid at death, but it was not until 1807 that the company began rating members according to age and other circumstances.<sup>135</sup> Coming to the United

<sup>128</sup> 2 Anderson's History of Commerce, 109; Hopkins' Marine Insurance, ed. 1867, 29.

<sup>128a</sup> Insurance Co. v. Dunham, 11 Wall. (U. S.) 32.

<sup>129</sup> Griswold's Fire Underwriters, ed. 1872, 74, 84.

<sup>130</sup> See, also, Walford's Insurance Guide, 2d ed., 198.

<sup>131</sup> Richards on Insurance, ed. 1892, sec. 8.

<sup>132</sup> See, also, Walford's Insurance Guide, 2d ed., 3, 13.

<sup>133</sup> See, also, 13 Encyclopedia Britannica, 180, 182; Griswold's Fire Underwriters, ed. 1872, 24; Walford's Insurance Guide, 2d ed., 25.

<sup>134</sup> Griswold's Fire Underwriters, ed. 1872, 20, 23.

<sup>135</sup> Richards on Insurance, ed. 1892, sec. 9; Hopkins' Marine Insurance, ed. 1867, 392, 393; 13 Encyclopedia Britannica, 180-82; 9 American

States, the earliest insurance company was the "Philadelphia Contributionship for the Insurance of Houses from Loss by Fire," organized on the mutual plan in 1752.<sup>136</sup> But the earliest benefit assurance case in the United States appears to be of date 1871,<sup>137</sup> and the next decision seems to be of date 1875.<sup>138</sup> While, therefore, the idea of mutual protection or mutuality as a principle of insurance is of very ancient origin, yet it has not approximated to true insurance until within a comparatively short time,<sup>139</sup> and it furnishes no adjudications in this country until recent years. It appears, then, that the principle of mutuality or reciprocity had been applied to protection against various emergencies certainly before marine insurance came into general use, if not before it had been used at all, and that even in England it became the basis of incorporation of several life and fire companies before marine insurance had assumed any proportions as an organized system, and thus, also, before marine insurance decisions commenced, under that eminent jurist, Lord Mansfield, from 1756, to make that marked progress which they then did in establishing leading principles of insurance. It is proper to mention here the origin of cattle insurance societies, which in their constitution and management resemble Friendly Societies. They were introduced during the panic caused by the cattle plague, and were established and regulated under the Friendly Societies Act of 1875<sup>140</sup> for insurance of neat cattle, sheep, lambs, swine, and horses, in case of death by disease or otherwise.<sup>141</sup> Whatever defects may have existed in the infancy of the assessment system or mutual system of insurance, great strides have been made toward plac-

*Cyclopedia*, 424, et seq.; *Bliss on Life Insurance*, ed. 1872, secs. 1, 2; *Reynolds' Life Insurance*, ed. 1853, 4, 5; *Walford's Insurance Guide*, 2d ed., 25.

<sup>136</sup> *Griswold's Fire Underwriters*, ed. 1872, 36, et seq. For the history of mutual companies and their plans of organization in New York, and the statutes relating thereto down to and including that of 1849, see opinion of Denio, C. J., in *White v. Haight*, 16 N. Y. 310.

<sup>137</sup> *Wetmore v. Mutual etc. Co.*, 23 La. Ann. 770.

<sup>138</sup> *Maryland Mut. Ben. Soc. v. Clendinen*, 44 Md. 429; s. c., 22 Am. Rep. 521.

<sup>139</sup> See *Tabor's Three Systems of Life Insurance*, 11, 120, et seq.

<sup>140</sup> 38 & 39 Vict., c. 60, sec. 8, sub. 2.

<sup>141</sup> *Rapalje & Lawrence's Law Dictionary*, 179.



ing the same on a scientific basis, so that now some of the largest and most successful companies are mutual companies.<sup>142</sup>

§ VI. **Origin of Fire Insurance.**—Although life assurance may claim an earlier date for its origin, yet the idea of security in case of fire seems to have followed more closely upon marine insurance than the adoption of life insurance. It is said that efforts were made among the early Saxon guilds to guarantee protection against fire, and we have seen that Friendly Societies offer this indemnity in some measure. It is also said that insurance was applied to fire risks as early as 1609, and in 1670 there is a record of a company formed at Edinburgh for "Friendly Assurance against Fire." But it was not, however, till after 1666, when the great fire in London occurred, that the idea of fire insurance assumed in England any organized shape as a system. In 1680 a proprietary company, the "Fire Office," formed in London. In 1681 the corporation of London opened books for securing and entering subscriptions, for fire insurance, but the scheme was dropped. Then came in 1686 the "Friendly Society for Insuring Houses from Fire." But the first regular office which is said to have transacted any business was the "Amicable Contribution," organized in 1696, and in 1710 the first mutual and stock company, "The Sun Fire Office," was formed. Passing down to the two companies, the Royal Exchange and London Assurance, chartered in 1720, we find that they added fire risks to their scheme of insurances. In the United States fire insurance took an early start, since an agency for a fire office is said to have existed in Boston in 1724, though the earliest fire company organized here was the Philadelphia Contributionship of date 1752.<sup>143</sup> It is noteworthy that the first fire companies also undertook to extinguish fires.<sup>144</sup> The

<sup>142</sup> See Tabors' *Three Systems of Life Insurance*, 24; Richards on Insurance, ed. 1892, secs. 7, 9, p. 14.

<sup>143</sup> Reynold's *Life Insurance*, ed. 1853, 2; Griswold's *Fire Underwriters*, ed. 1872, 19-48; 13 *Encyclopedia Britannica*, 161, et seq; Richards on Insurance, ed. 1892. sec. 8; Walford's *Insurance Guide*, 2d ed., 3, 13, 14; Hopkins' *Marine Insurance*, ed. 1867, 47, 48; Jacobs' *Law Dictionary*, title "Insurance, v."

<sup>144</sup> 13 *Encyclopedia Britannica*, 166; Walford's *Insurance Guide*, 2d ed., 25.

above facts show that fire insurance, as a systemized plan, cannot date its growth from a date anterior to 1666 in England, nor does it appear to have become an organized system in this country prior to 1752. It is also said that there was no organized system of insurances against losses of houses by fire in England, outside of London and Westminster, until the organization of the Sun Fire Office above mentioned, and that there were no insurances against losses of goods by fire prior to that time, and that the insurances issued by this office were contracts only between it and the persons insuring, the loss being confined to the contracting parties only.<sup>144a</sup>

§ VII. *Origin of Life Insurance.*—It is asserted by some writers that life insurance had its beginning in the 16th century. Life insurance is said to claim a very ancient origin. Meredith<sup>145</sup> asserts that the Ordinance of Wisbay mentions insurance upon life. As we have already stated, there is much disagreement as to the date of this Ordinance, it being placed anterior to 1075, and as late as 1320. It is said that about the time of the division of the Roman Empire,<sup>146</sup> a table was in existence by which annuities could be valued,<sup>147</sup> and this is noteworthy in this connection since annuities are based upon the principles of lifecontingency upon calculations made by means of the mortality tables,<sup>148</sup> although an annuity transaction is the very reverse of a life transaction, it being to the interest of a life company that the insured should live, but contra in the case of an annuitant.<sup>149</sup> The Guidon de la Mer, of date somewhere between 1556 and 1584, mentions life assurance as a long-established and familiar custom in certain countries. Scaccia, in *De Commerciis*, in an

<sup>144a</sup> *Lynch v. Dalzell*, 3 Bro. Par. Cas. 497.

<sup>145</sup> Emerigon on Insurance, Meredith's ed. 1850, 160, n. b.

<sup>146</sup> This date is variously fixed at A. D. 305, 364, 395. See Montesquieu's *Grandeur and Decline of the Romans*, Baker's Notes, ed. 1882, 358, et seq., 368, et seq.; Gibbon's *Decline and Fall*, vol. 2, 529, vol. 3, 127, 165; Smith's *Gibbon*, 98, c. 8; 14 *American Cyclopaedia*, title "Rome," 406; 8 *Chambers' Encyclopedia*, title "Rome," 793.

<sup>147</sup> Walford's *Insurance Guide*, 2d ed., 15.

<sup>148</sup> 13 *Encyclopedia Britannica*, 161.

<sup>149</sup> Walford's *Insurance Guide*, 2d ed., 25.

edition of 1620, which is not the earliest, refers extensively to the contract, and gives a form of policy then in use. France and several other countries prohibited insurances on lives. Although it was forbidden in France from an early period, and such assurances were void upon the proposition that "man cannot be estimated at a price," and that "the life of man is not an object of commerce, and it is odious that his death should form matter of mercantile speculation"; and although such contracts were considered mere wagers by Emerigon, yet at Naples, Florence, and other places life assurances were permitted; and even in France "all navigators, passengers, and others" were permitted to insure the freedom of their persons; that is, the liberty of persons and not the persons were permitted to be insured by fixing in the policy a definite sum to be paid as a ransom, or to stipulate generally that the insurers should procure the freedom of the person. It is also conjectured that insurance was employed during the Middle Ages in assuring the personal liberty of pilgrims to the Holy Land. However, insurance on life has been permitted in France since 1820.<sup>150</sup> It is unnecessary to pursue our investigations farther as to foreign countries other than England, and there we find that Maylnes,<sup>151</sup> in the edition 1622, mentions assurance upon life. However, the first life company had its birth in 1698 by the Mercers, as a widow's fund, an annuity scheme, and that this was quickly followed in 1699, when a "Society of Assurances for Widows and Orphans" was formed.<sup>152</sup> It is to the year 1706, though, that we must look for the first definite scheme

<sup>150</sup> Emerigon on Insurance, Meredith's ed. 1850, 157, et seq., and notes a and b; Bliss on Life Insurance, ed. 1872, secs. 1, 2. Life assurances were forbidden in France by the Ordonnance of Louis XIV., of date 1681; in the Netherlands by the Ordonnance of Philip II. of 1570; by the civil statutes of Genoa, of 1588; by the Amsterdam Ordonnance of 1598, and by the Rotterdam Ordonnances of 1604 and 1635, Reynolds' Life Insurance, ed. 1853, 10; Walford's Insurance Guide, 2d ed., 22; Bunyon's Life Assurance, ed. 1854, 7. The last author says life assurance was not reintroduced in France till the latter part of the 18th century.

<sup>151</sup> Maylnes' Lex Mercatoria, 149.

<sup>152</sup> Bliss on Life Insurance, ed. 1872, secs. 1, 2; 13 Encyclopedia Britannica, 180, 182; Reynolds' Life Insurance, ed. 1853, 3, et seq; Walford's Insurance Guide, 2d ed., 24; 9 American Cyclopaedia, 424, et seq.

of life assurance, which was that of the amicable company already noted, which society changed its system in 1734, and again in 1807, which last lease of corporate life was based more upon the scientific principles of true insurance than it had before possessed. It is probably upon the basis of the establishment of this company that Hopkins declares that life insurance did not take its rise before the 18th century. The progressive step taken by the Amicable in 1807 was the rating of new members "according to age and other circumstances." This plan, however, had been anticipated by the Royal Exchange and London Assurance Companies, chartered in 1720; while the Equitable, started in 1762, is said to have "possessed from the outset all the essential features of a life assurance office."<sup>153</sup> In 1774, it having "been found by experience that the making insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming, for remedy whereof," etc., says the preamble, an act was passed in England,<sup>154</sup> prohibiting insurance on lives or any other event or events, wherein the person to be benefited should have no interest, "or by way of gaming or wagering." The act further provided that the name of the beneficiary should be inserted in the policy.<sup>155</sup> In the United States the earliest corporation was formed in Pennsylvania in 1769 for the benefit of families of Episcopal clergymen.<sup>156</sup> Reynolds, however,<sup>157</sup> says that life insurance was introduced here by a company formed in 1814, followed by another company in 1815, both of which added life to marine and fire risks,<sup>158</sup> and that it was

<sup>153</sup> Bliss on Life Insurance, ed. 1872, secs. 1, 2; 13 *Encyclopedia Britannica*, 169, 180, 182; Hopkins' *Marine Insurance*, ed. 1867, 32, 33, 47, 48; Richards on Insurance, ed. 1892, sec. 9; Reynolds' *Life Insurance*, ed. 1853, 2, 4, et seq.; 9 *American Cyclopaedia*, 424; Walford's *Insurance Guide*, 2d ed., 24, 25; Jacobs' *Law Dictionary*, title "Insurance, v"; 33 *Geo. III.*, c. 14 (1793).

<sup>154</sup> 14 *Geo. III.*, c. 48.

<sup>155</sup> Life insurance statutes will be noted hereafter under their appropriate heads.

<sup>156</sup> 9 *American Cyclopaedia*, 424, et seq.; Richards on Insurance, ed. 1892, sec. 9.

<sup>157</sup> Reynolds' *Life Insurance*, ed. 1853, 7, 8.

<sup>158</sup> *Viz.*: The Dutchess County Insurance Company, chartered in 1814, and the Union Insurance Company in 1815

not till 1818 that a corporation was formed in the United States having for its sole object the insurance of lives.<sup>159</sup> At the beginning of the present century but few cases of value on life insurance had been reported in the English books,<sup>160</sup> while the earliest life case in the United States was decided in Massachusetts.<sup>161</sup> Life assurance, therefore, did not assume any great importance either in a legal aspect or as a business until within a few years. In fact, it is asserted that its growth did not become marked in the United States till as late as 1843 or perhaps 1858.<sup>162</sup>

§ VIII. **Origin of Accident Insurance.**—We have already noted under preceding sections cattle insurance, and that form of casualty insurance known as insuring the liberty of persons, but insurance which relates to the loss of life or limb, or other personal injury by accident, is of modern origin. Accident insurance, in its original form, seems to have comprehended railway accidents, only for which purpose a company was established in London in 1849, known as the Railway Passengers' Assurance Company, but in 1856 it extended its plans to embrace accidents of all kinds, and the first American company was said by a writer in 1873 to have been then only ten years old.<sup>163</sup>

§ IX. **Origin of Guaranty—Fidelity Guaranty—Title Guaranty, etc.—Insurances.**—These and kindred insurances have become an important and useful branch of the

<sup>159</sup> Viz.: The Massachusetts Hospital Life Company.

<sup>160</sup> Jacobs' Law Dictionary, title "Insurance," which is apparently compiled from Justice Parks' work on Insurance, edition of 1802, notes only twelve cases, while Comyn's Digest, 4th edition, published in 1800, notes only four cases. In 1649 the case of Bendye v. Oyle, sty. 166, 172, was a life case, although no principle of life insurance was involved, it being only a question of prohibition to the court of commissioners. For insurance cases to 1795, see Beawes' Lex Mercatoria, 302, et seq.

<sup>161</sup> Lord v. Dall, 12 Mass. 115.

<sup>162</sup> 9 American Cyclopaedia, 424, et seq.

<sup>163</sup> Bunyon's Life Assurance, 2d ed., 100; 13 Encyclopedia Britannica, 161; 1 Am. & Eng. Ency. of Law, 87; Richards on Insurance, ed. 1892, sec. 9; Walford's Insurance Guide, 2d ed., 10, 11; 1864, 27 & 28 Vict., c. 125; 7 American Law Review, 585; Porter's Law of Insurance, 1864, c. 24, 431.

system of insurance. The decisions, however, are comparatively few.<sup>164</sup>

§ X. **Origin of Other Insurances.**—In England the earliest schemes of insurances covered almost every conceivable subject or contingency,<sup>165</sup> but the progress of modern insurances and the safeguards thrown around them for the protection of the public have done much to place insurance on a legitimate basis, and the necessities of business have given rise to the outgrowth of many branches of the system designed to cover special emergencies. In Michigan an act was passed in 1887 providing for the organization and regulation of log and timber insurance companies. Such insurances are intended to indemnify against the risk of lake and river navigation in the transporting and towing of such property.<sup>166</sup> The insurance laws of New York provide generally for the organization of companies for insuring (1) the lives and health of persons, and for granting and disposing of annuities; (2) against injury, disablement, or death resulting from traveling or general accidents; (3) against accidents from employers; (4) guaranteeing fidelity of persons holding public or private places of trust; guaranteeing performance of contracts, bonds, or undertakings; (5) against loss by burglary or theft, or both; (6) against breakage of glass; (7) upon steam-boilers, pipes, etc., against explosion and accident and loss or damage to life or property resulting therefrom; (8) against any casualty which may lawfully be the subject of insurance. Such statutes also specially provide for the incorporation of life, health, and casualty insurance companies; fire and marine insurance corporations; life and casualty companies upon the co-operative or assessment plan, fraternal benefit societies, orders, or associations, corporations for insurance of domestic animals, and town and county co-operative insurance companies.<sup>167</sup>

<sup>164</sup> 9 Am. & Eng. Ency. of Law, 65; 13 Encyclopedia Britannica, 161; Richards on Insurance, ed. 1892, sec. 10.

<sup>165</sup> See Walford's Insurance Guide, 2d ed., 1-3, 24, et seq.

<sup>166</sup> Act Mich., April 16, 1887; Acts, 1887, No. 73, p. 80.

<sup>167</sup> Hamilton's Stat. Rev. Ins. Laws, N. Y. 1892; amended 1893 and 1894, being chapter 690, constituting chapter 38 of the general laws. Joyce, Vol. 1-3



## **TITLE II.**

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### **GENERAL TERMS AND DEFINITIONS.**

(25)





## TITLE II.

### GENERAL TERMS AND DEFINITIONS.

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#### CHAPTER I.

##### TERMS AND DEFINITIONS.

- § 1. "Insured" and "assured" synonymous.
- § 2. Definition of insurance.
- § 3. Contract to indemnify assured for bank's default is contract of insurance.
- § 4. Sanitary inspection of buildings, etc., is not insurance.
- § 5. Definition of marine insurance.
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- § 7. Definition of life insurance.
- § 8. Definition of accident insurance.
- § 9. Definition of casualty insurance.
- § 10. Definition of endowment insurance.
- § 11. Definition of tontine insurance.
- § 12. Definition of guarantee insurance.
- § 13. Definition of real estate and title insurance.

§ 1. "Insured" and "Assured" Synonymous.—Some writers have attempted to distinguish between the terms "insured" and "assured."<sup>1</sup> But an examination of the early English cases and statutes does not discover any distinction between them as applied to the subject of insurances.<sup>2</sup> Lord Bacon<sup>3</sup>

<sup>1</sup> Babbage on Assurance of Lives; 13 Encyclopedia Britannica, 169.

<sup>2</sup> See preamble, 43 Eliz., c. 12 (1601), which reads: Whereas, heretofore, "assurers," etc., "have sought to draw the parties assured to seek their moneys of every several assurer." See, also, Stat. 6 Geo. I., c. 18 (1719); Stat. 19 Geo. II., c. 37 (1746); Stat. 14 Geo. III., c. 48 (1774.) "Assurances" related formerly to the conveyance of property in England, as is evidenced by Sheppard's work entitled "The Touchstone of Common Assurances . . . or conveyances of the Kingdom." So, in 1627, Charles I. introduced a project "for . . . making and registering . . . assurances."

<sup>3</sup> Bacon's Abridgment, ed. 1778, 598, 599.

says this "kind of contract or dealing is commonly called 'policy of assurance,' or 'insurance.'"<sup>4</sup> Mr. Hopkins asserts that their meaning is identical, and bases his statement on the derivation of the words. Other writers use the terms indiscriminately. Mr. Justice Field, in the *Connecticut Mutual Life Insurance Company v. Luchs*,<sup>5</sup> declares that "there are undoubtedly instances where this distinction between the terms 'assured' and 'insured' is observed, though we do not find any judicial consideration of it." In this case a policy was issued on L.'s application, by which the company agreed to insure the life of D., and to pay the money to the "assured" after due notice and proof of D.'s death, and it was decided that the term "assured" must be held as applicable to L., as being the party for whose benefit the insurance was intended, the court saying: "The application of either term to the party for whose benefit the insurance is effected or to the party whose life is insured has generally depended upon its collocation and context in the policy."<sup>6</sup> This case was expressly fol-

<sup>4</sup> Hopkins' *Marine Insurance*, ed. 1867, 46.

<sup>5</sup> 108 U. S. 498, 504.

<sup>6</sup> See, also, *Cyrenius v. Mutual L. Ins. Co.*, 73 Hun (N. Y.), 365; 26 N. Y. Supp. 248; 55 N. Y. 897. In this case the court said: "It is to be observed that in the policy the amount is payable 'to the said assured, his executors, administrators, or assigns.' The question is, Does the term 'assured' refer to George A. Cyrenius, who is recited to have paid the consideration, or to Alvin Cyrenius, whose life was the subject of the insurance? In determining this question the application may properly be referred to. That was executed by both Alvin and George A., and on its face stated that it was the basis and a part of the contract. It is referred to in the policy as furnishing in part the consideration. The policy is stated to be issued upon the faith of the statements and declarations made in the application. Both are part of one transaction, and are to be read together in determining its character and effect. Reading the policy and application together, it appears that George A. Cyrenius was the applicant for the insurance, and was the person for whose benefit it was to be effected. The policy recites that the money consideration is received from him, and in the complaint it is alleged that he paid it. Such being the case, according to the doctrine laid down in *Smith v. Etna Life Insurance Company*, 5 Lans. (N. Y.) 545, the assured would be deemed to be George A. Cyrenius. A similar view is taken in *Connecticut Mutual Life Insurance Company v. Luchs*, 108 U. S. 498." See *New York L. Ins. Co. v. Ireland* (Tex. 1891), 21 Ins. L. J. 161; 17 S. W. Rep. 617. In *Irving v. Manning*, 4 H. L. Cas. 303, 307, in the

lowed in *Brockway v. Connecticut Mutual Life Insurance Company*,<sup>7</sup> which latter case was based upon substantially the same material facts and precisely the same policy, the court holding that the same construction should be given the term "assured" as was given in *Connecticut Mutual Life Insurance Company v. Luchs*.<sup>8</sup> So in other cases this term has been held to mean the person for whose benefit the insurance was made, rather than the one upon whose life it depends.<sup>9</sup> On the other hand, in *Campbell v. New England Mutual Life Insurance Company*,<sup>10</sup> the policy was issued upon the life of A. to him, as "the assured," and the promise was to pay the sum insured to the assured, his executors, etc., for the benefit of his brother's wife, and the court declared that the plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured; that she was merely the person designated by agreement of the parties to receive the proceeds of the policy on the death of the assured. There was, however, no discussion as to the meaning of these terms.<sup>11</sup> In a Massachusetts case<sup>12</sup> the words "insured" or "assured" in a mutual fire insurance policy were held to apply to the person who owned the property, applied for the insurance, paid the premium, and signed the deposit note, and not another to whom the money was payable in case of loss, although he might have a lease of the premises. Again, where the loss was payable to the "assured" under an agreement to reinsure, it was decided that by "assured" was meant the company reinsured, and not the assured under the original policy.<sup>13</sup> The construction, however, does not appear

opinion of the judges the words "assured" and "policy of assurance" are used.

<sup>7</sup> 29 Fed. Rep. 766.

<sup>8</sup> 108 U. S. 498, 504.

<sup>9</sup> *Hogle v. Guardian L. Ins. Co.*, 4 Abb. Pr., N. S. (N. Y.), 346, 348; *Ætna L. Ins. Co. v. France*, 94 U. S. 562. In this case the policy provided that the sum insured should be paid "to the said assured, her executors," etc., and the policy was effected by a brother for a sister's benefit: *Reynolds on Life Insurance*, sec. 22.

<sup>10</sup> 98 Mass. 381, 389.

<sup>11</sup> See, also, *Hurlburt v. Pacific Ins. Co.*, 2 Sum. (C. C.) 471, 479.

<sup>12</sup> *Sanford v. Mechanics' Mut. F. Ins. Co.*, 12 Cush. (Mass.) 541.

<sup>13</sup> *Carrington v. Commercial Ins. Co.*, 1 Bosw. (N. Y.) 152.

in any of these cases to have turned upon any distinction between the terms themselves, but rather upon the relation which they sustained to the other words of the policy, and were construed as they were for the purpose of effectuating the intent of the parties to the contract, and determined that the loss was payable to the party whose interest was intended to be covered where the description might apply to more than one. We cannot discover that any distinction of practical value has ever been made by the text-writers or the courts in the use of these words, except in those cases where their meaning or application has depended upon the construction of some particular policy, and we shall therefore use the terms throughout this work as synonymous.<sup>14</sup> If parties agree to "reinsure" loss if any, "payable to the assured upon the same terms and conditions, and at same time as contained in the original policies," the word "assured" means the reinsured company, and not the assured in the original policies.<sup>15</sup>

**§ 2. Definition of Insurance.**—Insurance, strictly defined, is a contract whereby one for a consideration agrees to indemnify another for liability, damage, or loss by certain perils to which the subject may be exposed, but the contracts of life insurance and of accident insurance covering death are not strictly contracts of indemnity.<sup>16</sup> Emerigon<sup>17</sup> defines insurance as "a contract by which one promises indemnity for things transported by sea, deducting a price agreed upon between the assured, who makes or causes to be made the transport, and the insurer, who takes upon himself the risk and burdens himself with the event," and he adds: "This definition is taken from the Guidon la Mer, and is the doctrine of all our authors." He also says that it "is a contract by which one takes upon himself the peril which the property of others encounters upon the

<sup>14</sup> See Bouvier's Law Dictionary; Bacon's Benefit Societies and Life Insurance, ed. 1888, sec. 19, p. 22; Id., ed. 1894, sec. 19, p. 27; 13 Am. & Eng. Ency. of Law, 630.

<sup>15</sup> Carrington v. Commercial etc. Ins. Co., 1 Bosw. (N. Y.) 152.

<sup>16</sup> See next chapter as to this distinction.

<sup>17</sup> Emerigon on Insurance, Meredith's ed. 1850, c. i, p. 2.

sea."<sup>18</sup> This definition, of course, relates to marine insurance, as do the early definitions.<sup>19</sup> Insurance is now defined under

<sup>18</sup> *Id.*, 4.

<sup>19</sup> Many other definitions of insurance have been given. Mr. May's (*May on Insurance*, 3d ed., sec. 1) definition of insurance is: "A contract whereby one for a consideration undertakes to compensate another if he shall suffer loss," and he says it is substantially the definition given long ago by Roccus. This last definition is also given by Mr. Field: (*Field on Damages*, 2d ed., sec. 561.) Laurence, J., in *Lucena v. Crawford*, 5 Bos. & P. 269, 301, defines the contract as follows: "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them." This definition is approved in *Cummings v. Insurance Co.*, 55 N. H. 457, per Foster, C. J., although the court gives preference to the definition of Blackstone (2 Blackstone's Commentaries, 458; 2 Hamond's ed. 696; Chase's Blackstone, 567), which is this: "A policy of insurance is a contract between A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event." The statute 43 Elizabeth, chapter 12, declares that a policy of assurance is when a merchant gives a consideration in money to others to assure his goods, ship, or other things by him adventured, upon such terms as may be agreed between the merchant and assurers. Mr. Phillips (*Phillips on Insurance*, 3d ed., sec. 1) says: "Insurance is a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against damage or loss on a certain subject by certain perils." While Mr. Marshall (*Marshall on Insurance*, ed. 1810, 1) defines the contract as one "whereby one party, in consideration of a stipulated sum, undertakes to indemnify the other against certain perils or risks to which he is exposed, or against the happening of some event." In *Rensinhouse v. Seeley*, 72 Mich. 603, 617, the court declares that insurance is "an agreement by which one party, for a consideration, promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest." In *Cross v. National Fire Insurance Company*, 132 N. Y. 133, it is said: "A contract of insurance is intended as an indemnity against an uncertain event, which, if it occurs, will cause loss to the assured." The definition given by Gray, J., in *Commonwealth v. Weatherbee*, 105 Mass. 149, 160, has been cited with approval in several cases (cited in *State v. Farmers' Ben. Assn.*, 18 Neb. 276, 281; *State ex rel. v. Vigilant Ins. Co.*, 30 Kan. 585, 587, per Brewer, J.; *Supreme Commandery K. G. R. v. Ainsworth*, 71 Ala. 436, 443, per Brickell, C. J.; *State ex rel. v. Merchants' Exch. Mut. Ben. Soc.*, 72 Mo. 146, 159, per Napton, J.), and is as follows: "A contract of insurance is an agreement by which one party, for a consideration (which is usually paid in money either in one sum or at different times during the continuance of the risk), promises to make a certain payment of money upon the destruction or injury of something in which

the statutes in several states.<sup>20</sup> It is said in *Funke v. Minnesota Farmers' Mutual Fire Insurance Association*<sup>21</sup> that "the word 'insurance' in common speech and with propriety is used quite as often in the sense of contract of insurance or act of insuring, as in that expressing the abstract idea of indemnity or security against loss." This construction was in a case where the condition was against making any insurance in any other company.

**§ 3. Contract to Indemnify "Assured" for Banks' Default is Contract of Insurance.**—If a party designated as the assured be guaranteed under an instrument purporting to be a policy of "insurance" against the loss of a sum of money deposited in a bank, it is a contract of insurance.<sup>22</sup> In this case there was a contract under which "the Mortgage Insurance Corporation, Limited," guaranteed to a depositor in a certain bank the payment of the amount deposited, should the

the other party has an interest. In fire insurance and marine insurance the thing insured is property; in life or accident insurance it is the life or health of a person." Insurance is a contract of indemnity, in which the parties may stipulate for the manner and time in which that indemnity shall be made, and the law will enforce such contract: *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 205; 78 Am. Dec. 418. See, also, *Paterson v. Powell*, 9 Bing. 320, per Tindal, J., and Mr. Sergeant Coleridge's argument; *Commonwealth v. Beneficial Assn.*, 137 Pa. St. 419; *American L. of H. v. Larmour*, 81 Tex. 71; *Rapalje & Lawrence's Law Dictionary*, 667; *Smith's Common Law*, 299; *Bacon's Abridgment*, 4th ed., 598, 599.

<sup>20</sup> Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event: *Deering's Annot. Civ. Code, Cal.*, sec. 2527; *Dakota Codes (Levissee)*, p. 1027, sec. 1474; *Georgia Code*, 1882, sec. 2794; *Supplement 1888, Pub. Stat. Mass.*, p. 511, sec. 3, c. 214; *Sanders' Annot. Civ. Code, Mon.*, sec. 3370; *Rev. Code N. Dak.*, 1895, sec. 4441; *Stat. Okla.*, 1890, sec. 3043, p. 608, c. 44. The insurance laws of New York provide for the incorporation of marine insurance companies "for the purpose of making insurance upon vessels, freights, goods, wares, merchandise, specie, bullion, jewels, profits, commissions, bank-notes, bills of exchange, and other evidences of debt, bottomry and respondentia interests, and every insurance appertaining to or connected with marine risks and risks of transportation and navigation": *Hamilton's Statutory Rev. of Insurance Laws*, 1892; amended 1893-94, c. iv, sec. 150, p. 73.

<sup>21</sup> 29 Minn. 347, 354, per Dickinson, J.

<sup>22</sup> *Dane v. Mortgage Ins. Corp., Ltd. (Eng. C. A. 1894)*, 1 Q. B. Div. 54.

bank fail to pay. The contract used these words: "This policy of insurance," and the court in construing the same said: "It seems to me that the intention was this contract should be one of insurance, and that those who entered into it with the plaintiff should be in the position of underwriters. Here the policy recites that the plaintiff is the holder of a deposit receipt for one thousand pounds of the Commercial Bank of Australia, and is desirous of being 'insured' as thereafter appearing, and the defendants thereby in effect promise to pay the assured the principal sum if the debtors have made default in so doing. What the defendants have done, as it appears to me, is to insure payment of the deposit receipt according to the contract made between the depositor and the bank, i. e., that the bank will pay the amount at the date fixed by that contract for payment. The policy is not a guaranty that the bank will be able to pay. It is a positive, direct contract that if the bank does not pay a certain sum on a fixed day, the insurance company will pay that amount."<sup>23</sup>

**§ 4. Sanitary Inspection of Buildings, etc., is not Insurance.**—The inspection and certification as to the sanitary condition of buildings and premises is not insurance, within the New York statute.<sup>24</sup>

**§ 5. Definition of Marine Insurance.**—Marine insurance is a contract whereby one for a consideration agrees to indemnify another for loss or damage on a certain interest, subject to marine risks by certain perils of the sea or specified casualties during a voyage or a fixed period. This branch of insurance includes risks of river navigation and of railway and other land carriage connected with sea transit.<sup>25</sup> Another definition is this: "Ma-

<sup>23</sup> See *Young v. Trustee Assets & Invest. Ins. Co., Ltd.* (Scot. C. S. 1894), 31 Scot. L. R. 199.

<sup>24</sup> *People ex rel. v. Rosendale, Atty. Gen.* (N. Y. 1894), 36 N. E. Rep. 806; reversing 25 N. Y. Supp. 769. The court said: "This is not insurance in any legal sense, but an entirely distinct kind of business not within the purview of the statute now under consideration. We therefore hold that the declaration and charter of the proposed company were not in accordance with the requirements of law, and are not entitled to be filed in the office of the superintendent of insurance."

<sup>25</sup> See *Hopkins on Insurance*, ed. 1867, 53.



rine insurance is a contract of indemnity against all losses accruing to the subject matter of the policy from certain perils during the adventure."<sup>26</sup> Marine insurance is also defined under several statutes.<sup>27</sup>

**§ 6. Definition of Fire Insurance.**—Fire insurance is a contract whereby one for a consideration agrees to indemnify another for loss or damage on property by fire.<sup>28</sup>

<sup>26</sup> *Lloyd v. Fleming*, L. R. 7 Q. B. D. 299, 302, per Blackburn, J. Mr. Arnould (*Arnould on Marine Insurance*, 2d ed., 2) defines this contract as that "whereby one party, for a stipulated sum, undertakes to indemnify the other against loss arising from certain perils or sea risks to which his ship, merchandise, or other interest may be exposed during a certain voyage or a certain period of time." Mr. Phillips (*Phillips on Insurance*, 1) says: "Marine insurance is a contract whereby, for a consideration stipulated to be paid by one interested in a ship, freight, or cargo subject to marine risks, another undertakes to indemnify him against some or all those risks during a certain period or voyage." Another definition, given by Mr. Marshall (*Marshall on Insurance*, ed. 1810, 2), is as follows: "Marine insurance is that which is applied to maritime commerce, and is made for the protection of persons having an interest in ships or goods on board from the loss or damage which may happen to them from the perils of the sea during a certain voyage or a fixed period of time." While Chancellor Kent (3 *Kent's Commentaries*, 13th ed., 25) defines marine insurance as "a contract whereby one party, for a stipulated premium, undertakes to indemnify the other against certain perils or sea risks to which his ship, freight, and cargo, or some of them, may be exposed during a certain voyage or for a fixed period of time." This is the same definition given by Mr. Field in his work on Damages, second edition, section 562. Mr. Duer's definition (1 *Duer on Insurance*, ed. 1845, 1) is very brief, being this: "Marine insurance is a contract of indemnity against the perils of the sea." For other definitions, see *Lloyd v. Fleming*, L. R. 7 Q. B. D. 299, 302; 2 *Parsons on Contracts*, 7th ed., 350; *Rapalje & Lawrence's Law Dictionary*, 668; 13 *Encyclopedia Britannica*, 184; *Bacon's Abridgment*, 4th ed. 598, 599.

<sup>27</sup> Sea insurance is defined in England under Stamp Acts: 30 Vict., c. 23, sec. 4; 47 & 48 Vict., c. 62, sec. 8. Marine insurance is an insurance against risks connected with navigation, to which a ship, cargo, freightage, profits, or other insurable interest in movable property may be exposed during a certain voyage or a fixed period of time: *Deering's Annot. Civ. Code, Cal.*, sec. 2655; *Lester, Rowell & Hill's Ga. Code* (1882), sec. 2824; *Levissee's Dak. Code*, sec. 1563; *Annot. Code, Mon.*, 1895, sec. 3540; *Rev. Code, N. Dak.*, 1895, sec. 4537.

<sup>28</sup> The insurance laws of New York provide for the incorporation of fire insurance companies, "for the purpose of making insurances on dwelling-houses, stores, and all kinds of buildings and household furni-

**§ 7. Definition of Life Insurance.**—Life insurance is a contract dependent upon human life, whereby one for a consideration agrees to pay another a certain sum of money upon the happening of a given contingency, or upon the termination of a specified period.<sup>20</sup>

**§ 8. Definition of Accident Insurance.**—Accident insurance is a contract whereby one for a consideration agrees either (1) to indemnify another against personal injury resulting from accident, or (2) to pay another a certain sum of money in case of death caused by accident. It is said that accident insurance is intended to indemnify for injury resulting from accident or to compensate by payment of a fixed sum where death results to the insured in consequence of accident, and that the contract

ture and other property against loss or damage by fire, lightning, wind, storm, or tornadoes, and upon vessels, boats, cargoes, goods, merchandise, freights, and other property against loss or damage by all or any of the risks of lake, river, canal, and inland navigation and transportation: Hamilton's Statutory Revision of Insurance Laws of New York, 1892; amended 1893-94, art. iii, sec. 110, p. 52; and see, also, Lester, Rowell & Hill's Ga. Code, 1882, sec. 2794. It has also been defined as a contract by which the insurer undertakes in consideration of the premium to indemnify the insured against all losses which he may sustain in his house, goods, or merchandise by fire within the time limited in the policy: 11 Petersdorff's Abridgment, 9, note "Insurance." A recent definition is as follows: "Fire insurance is a contract to indemnify, in whole or part, one having an insurable interest in property from loss or damage caused by fire to the property insured": Sharp's Lectures on Fire Insurance, 1. Another author says: "Insurance against fire is a contract to indemnify the insured for loss or damage to his property occasioned by that element during a specified period": Flanders on Fire Insurance, 1, 17. And the court, in *Johannes v. Phoenix Insurance Company*, 66 Wis. 50, 56, 57 Am. Rep. 248, says: "By such contract the insurer agrees to compensate the insured for loss by fire of certain property for a given time." For other definitions, see Wood on Fire Insurance, 2d ed., p. 4; 2 Parsons on Contracts, 7th ed., 418; 7 Am. & Eng. Ency. of Law, 1002; *Wilson v. Hill*, 3 Met. (Mass.) 66, 68; 2 Marshall on Insurance, ed. 1810, \*784.

<sup>20</sup> *State ex rel. Clapp v. Federal Invest. Co.*, 48 Minn. 110; 21 Ins. L. J. 226; 50 N. W. Rep. 1028; 24 N. J. L. 576, 585; and see sec. 24, herein; Lester, Rowell & Hill's Ga. Code, 1882, sec. 2818; Supplement 1888, Pub. Stat. Mass., pp. 291, 292, c. 183, sec. 1. In an English case it is said life insurance "is simply a contract that on the consideration of a certain annual payment the company will pay at a

closely resembles that of life insurance.<sup>30</sup> It is also declared by the court, in *Healey v. Mutual Accident Association*,<sup>31</sup> that

future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid in order to purchase the postponed payment. Whatever event may happen meanwhile is a matter of indifference to the company. They do not found their calculations on that, but simply upon the probabilities of human life, and they get paid the full value of that calculation": *Law v. London India. L. Pol. Co.*, 1 Kay & J. 229, per Wood, V. C. So in *Fryer v. Moreland*, L. R. 3 Ch. 675, 685, Jessel, M. R., in construing the Succession Duty Act (16 & 17 Vict., c. 51), and the meaning of "policy of insurance on the life," etc., says those words mean "a contract, no doubt, for money. It is a purchase of a reversionary sum in consideration of a present payment of money, or, as is generally the case, on the payment of an annuity during the life of the person insuring"; and also says it is not a disposition of property at all, as "a mere covenant to pay money is not a disposition of property in the ordinary sense. The insurance company does not die, and therefore a covenant to pay money on the death of some other person is a mere contract to pay money." In *Bunyon on Life Insurance*, ed. 1868, 1, cited in *State ex rel. v. Mechanics' Exchange Mut. Ben. Soc.*, 72 Mo. 146, 159, the contract is "defined to be that in which one party agrees to pay a given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another." Mr. Marshall (2 *Marshall on Insurance*, ed. 1810, 766, says: "The insurance of a life is a contract whereby the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made a stipulated sum or an annuity equivalent upon the death of the person whose life is insured, whenever this shall happen, if the insurance be for the whole life, or, in case this shall happen within a certain period, if the insurance be for a limited time." For other definitions, see *Briggs v. McCullough*, 36 Cal. 550; *Petersdorff's Abridgment*, title "Insurance," 16; *St. John v. American etc. Ins. Co.*, 13 N. Y. 31, 38; 64 Am. Dec. 529; *Mutual L. Ins. Co. v. Allen*, 138 Mass. 27; 52 Am. Rep. 246, 247; *Dalby v. India etc. Assur. Co.*, 15 Com. B. 364, per Parke, B.; *Bliss on Life Insurance*, ed. 1872, sec. 3; see *Cooke on Life Insurance*, ed. 1891, sec. 1. "A contract by which the insurer, in consideration of a certain premium, either in a gross sum or by annual payments, undertakes to pay the person for whose benefit the insurance is made a certain sum of money or annuity on the death of the person whose life is insured": 1 *Smith's Mercantile Law*, Macdonell & Humphrey's ed. 1890, 491. In this connection it may be stated that under the act 55 George III., chapter 184, an insurance on the lives of cattle is held an insurance on lives: *Attorney General v. Cleobury*, 18 L. J. Ex. 395; 4 Ex. 65.

<sup>30</sup> 7 *American Law Review*, 585, 587.

<sup>31</sup> 133 Ill. 556, 560; 23 Am. St. Rep. 637.

"a policy of accidental insurance is issued and accepted for the purpose of furnishing indemnity against accidents and death caused by accidental means."<sup>32</sup> Under the Massachusetts act of 1887<sup>33</sup> accident insurance policies include "horse or vehicle policies," "general liability policies," "outside liability policies," and "elevator policies," all being intended to cover accidental injuries to persons arising from different causes, as specified within the policy classification, and the issuance of said policies is not carrying on more than "one class or kind of insurance."<sup>34</sup>

**§ 9. Definition of Casualty Insurance.**—Casualty insurance has been defined as an insurance against loss through accidents or casualties resulting in bodily injury or death.<sup>35</sup> In a case decided in Massachusetts a distinction is made by the court between "accident" and "casualty" insurance, it being said that the "distinguishing feature of what is known in our legislation as 'accident insurance' is that it indemnifies against the effects of accidents resulting in bodily injury or death. Its field is not to insure against loss or damage to property, although occasioned by accident. So far as that class of insurance has been developed it has been with reference to boilers, plate-glass, and perhaps to domestic animals and injuries to property by street-cars, and is known as 'casualty insurance.'"<sup>36</sup>

**§ 10. Definition of Endowment Insurance.**—Endowment insurance is, in general, a contract to pay assured a specified sum of money at the termination of a certain designated period, if he is then living, but to a person named if assured dies be-

<sup>32</sup> See *Employers' L. A. Corp., Lim., v. Merrill*, 155 Mass. 404; 29 N. E. Rep. 529; *Black's Law Dictionary*, 632; *Rapalje & Lawrence's Insurance Law Dictionary*, 668; *Bunyon on Insurance*, p. 100.

<sup>33</sup> C. 214, sec. 29, cl. 5.

<sup>34</sup> *Employers' L. A. Corp., Lim., v. Merrill*, 155 Mass. 404; 29 N. E. Rep. 529.

<sup>35</sup> *State ex rel. Clapp v. Federal Invest. Co.*, 48 Minn. 110; 50 N. W. Rep. 1028; 21 Ins. L. J. 226.

<sup>36</sup> *Employers' L. A. Corp., Lim., v. Merrill*, 155 Mass. 404; 29 N. E. Rep. 529. "Casualty insurance" defined, Supplement 1888, Pub. Stat. Mass., c. 183, pp. 291, 292.

fore the specified time.<sup>37</sup> There are, however, several forms of endowment policies, or rather, plans of endowment insurance.<sup>38</sup>

§ 11. **Definition of Tontine Insurance.**—Tontine insurance, strictly so called, derives its name from Tonti, an Italian, to whom its invention is accredited. It is based upon survivorship among a number who share an annuity, or rather participate in an apportionment of the profits upon the lapse of certain intervals, and the sum representing the share of one deceased is enjoyed by those who survive to this extent, that the profits to be apportioned among the survivors must, theoretically at least, increase as the deaths increase, until final division made among the survivors, or the last survivor may take the whole according as the terms of the agreement may provide. In this, as in other kinds of insurances, several plans have been devised which differ in a greater or less degree from "tontine" insurance strictly so called.<sup>39</sup> An insurance company which by

<sup>37</sup> State ex rel. Clapp v. Federal Invest. Co., 48 Minn. 110; 50 N. W. Rep. 1028; 21 Ins. L. J. 226.

<sup>38</sup> As to reserve dividend plan of W. P. Stewart, see Fuller v. Metropolitan L. Ins. Co., 37 Fed. Rep. 163.

<sup>39</sup> See Pierce v. Equitable L. Assur. Soc., 145 Mass. 56; 12 N. E. Rep. 858; 1 Am. St. Rep. 433; per Devens, J.; Uhlman v. New York L. Ins. Co., 109 N. Y. 421, 660; 17 N. E. Rep. 363; 4 Am. St. Rep. 432; 2 Abb. Law Dict. 572. "Besides the provision for payment by the insured on the happening of the event on which the liability of the insurer becomes consummated, provision is sometimes made for appropriation for the benefit of the insured of dividends or profits from the business conducted by the insurer. This is commonly done in what is known as a 'tontine policy,' wherein provision is made for the distribution of such profits at the expiration of a specified period": Cooke on Life Insurance, ed. 1891, 200, 201, sec. 110. "A species of life annuity propounded by Lorenzo Tonti, about 1650, as a mode by which governments might obtain loans. The general idea is that property is loaned, owned, or invested for the benefit of a certain number of persons who at first receive its income, the share of a deceased member increasing the sum divisible among the survivors; the last survivor taking the whole income or principal, as the case may be": Anderson's Dictionary of Law, 1039, title "Tontine." "A life annuity or a loan raised on life annuities with benefit of survivorship": 2 Rapalje & Lawrence's Law Dictionary, 1280, title "Tontine"; Wharton's Law Lexicon, 826, title "Tontine." "A species of association or partnership formed among persons who are in receipt of perpetual or life annuities, with the agreement that the shares or annuities of those who die shall accrue to the survivors": Black's Law Dictionary, 1178, title "Tontine."

a policy agrees that the surplus or profits derived from policies on the tontine savings fund assurance plan, that shall cease to be in force before the completion of their tontine dividend periods, shall be apportioned equitably among such policies as shall complete their tontine dividend periods, does not hold such surplus or profits as a trust. The amount to be apportioned is not a dividend in the limited sense in which that word is used in its application of dividends to stockholders. The assured is not a member of the corporation, but its creditor who has contracted with it. At the end of the fixed period, having complied with the contract on his own behalf, and made the payments required, he is entitled to have apportioned to him his share of a certain fund to be computed. This share, or its equivalent in value, is the assured's own property.<sup>40</sup> In *Bogardus v. New York Life Insurance Company*<sup>41</sup> the policy was on the tontine or "ten-year dividend system"; annual premiums were to be paid each year for ten years policy, to be voided in case of default, dividends to be allowed assured only in case he survived the ten-year dividend period, the policy being then in force. Aside from the provision for payment of amount at death, it was stipulated, in case of surviving the period specified and the policy remained in force, that there should be a payment in cash or annuity bonds of a proportionate share of dividends, accretions, etc., from a fund to be created by a certain class of policy holders, consisting of those effecting insurance on the same plan in the same year, and that the surplus and profits from certain funds of that class should be equitably apportioned among survivors of that class holding policies, and it was held that the policy did not require a separate investment of the funds of that class to which the policy belonged, and that the consent of assured to placing of dividends in a reserve fund did not extend its obligations in this respect. The court said: "No express obligations are assumed by the defendant, either in the policy or by the application, with reference to the management or investment of the funds in question, and the tontine plan is referred to as a known and

<sup>40</sup> *Pierce v. Equitable L. Assur. Co.*, 145 Mass. 56, 61, 62, per Devens, J.; 1 Am. St. Rep. 433.

<sup>41</sup> 101 N. Y. 328, per Ruger, C. J.  
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understood system of insurance pursued by all life companies of similar character to determine in a certain contingency the extent of the company's liability to a special class of its policy holders. It contemplates the union of the interests of a large number of persons, and the administration of a fund for their mutual benefit, and from its very nature is incapable of being molded and managed to meet the special requirements of particular individuals. Upon the accession of every person to this class, he becomes interested in the contributions of every other member, and neither of them can afterward withdraw his contribution without injury to the rights of all others interested in the fund. . . . We therefore think that the use of these moneys in connection with its other funds, and their investment and management according to the mode which in the judgment of the defendant was best adapted to promote the interests of all of its policy holders, was entirely legitimate, and in accordance with the true meaning of the contract. The tontine plan undoubtedly contemplated such action on the part of the insurers as would enable them at the expiration of the ten-year dividend period to determine the aggregate of such dividends, accretions, and interest, and to divide the same among the survivors of the class to which they belonged according to their respective rights therein; but it seems to us that it does not involve the necessity of keeping separate from its other funds either the premiums paid by such class or their profits or accumulations, or the duty of separately handling, investing, or accumulating such funds."<sup>42</sup>

**§ 12. Definition of Guaranty Insurance.**—Guaranty insurance is a contract whereby one for a consideration agrees to indemnify another against loss arising from the want of integrity, fidelity, or insolvency of employees and persons holding positions of trust, against insolvency of debtors, losses in trade, losses from nonpayment of notes and other evidences of indebtedness, or against other breaches of contract. It includes other forms of insurance which are specifically classified,

<sup>42</sup> As to uncertainty of amount to be received, see *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 459, per Gray, J.; *Uhlman v. New York L. Ina. Co.*, 109 N. Y. 430, 431, per Peckham, J.; 4 Am. St. Rep. 482.

such as "fidelity guaranty," "credit guaranty," etc.<sup>43</sup> Policies on life insurance and ship policies are contracts for securing against losses to be incurred under circumstances entirely different from the loss contemplated under guaranty policies.<sup>44</sup>

§ 13. **Real Estate and Title Insurance.**—Title guaranty insurance is a contract whereby one agrees for a consideration to guarantee or protect another's title to real estate. Mr. Richards<sup>45</sup> says: "Their policies obligate the insurers to do three things for the protection of the insured: 1. To defend suits against the title at the expense of the insurers; 2. To pay judgments rendered; 3. If the insured contracts to sell or loan, and the title is refused, to test its validity in court at the expense of the insurer, and, if defeated, to pay damages and also protect the property where the insured has contracted to sell it." The insurance laws of New York provide for organization of title and credit guaranty companies "for either one or the other of the following purposes: 1. To examine titles to real property and chattels real, to procure and furnish information in relation thereto, make and guarantee the correctness of searches for all instruments, liens, or changes affecting the same; and to guarantee and insure bonds and mortgages, and the owners of real property and chattels real, and others interested therein, against loss by reason of defective titles thereto and other encumbrances thereon; . . . 2. To guarantee and indemnify merchants, traders, and those engaged in business, and giving credit for loss and damage by reason of giving and extending credit to their customers and those dealing with them."<sup>46</sup> As to the nature of this contract it is said in Minne-

<sup>43</sup> See Bunyon on Insurance, 107; 9 Am. & Eng. Ency. of Law, 65; 13 Encyclopedia Britannica, 161. The statutes, Georgia Laws, 1887, No. 360, page 108, regulate and define fidelity insurances. See second note under next section.

<sup>44</sup> Towle v. National Guard Ins. Co., 7 Jur., N. S., 618, 623.

<sup>45</sup> Richards on Insurance, ed. 1892, sec. 10, p. 14.

<sup>46</sup> Hamilton's Statutory Revision of Insurance Laws of New York, 1892, amended 1893-94, art. v. sec. 170, p. 81. See Sandel & Hill's Ark. Dig., Stat. 1894, secs. 4145-64, guaranty and surety companies; Del. Code, 1852, as amended, 1893, p. 585 (c. 694, vol. 18), fidelity insurance and corporate suretyship.



sota, *Title Insurance and Trust Company v. Drexel* <sup>47</sup> that "the insurer is not a surety. The defendant company for an adequate consideration agreed to 'indemnify, keep harmless, and insure, Drexel, the mortgagee, 'from all loss or damage not exceeding fifty-five thousand dollars,' the amount of the mortgage debt, which he or his assigns might sustain by reason of defects in the title to the mortgaged premises, or by reason of liens or encumbrances thereon existing at the date of the policy. The contract is plain and explicit on this point. In a word, it is a guaranty that the mortgagee should not suffer any loss or damage by reason of defects in the title to the property, or liens or encumbrances thereon existing at the date of the policy, under this guaranty, if the mortgaged property with a clear title and free from encumbrances was worth the amount of the mortgage debt, the mortgagee could confidently rely upon the sufficiency of his security."

<sup>47</sup> 70 Fed. Rep. 194, 198 (O. C. App., 8th Ct., 1895), per Caldwell, J. Laws applicable to sureties do not apply to guaranty and surety companies to indemnify against losses by bad debts: *Tebbets v. Mercantile etc. Co.*, 38 U. S. App. 431; 73 Fed. Rep. 95; 19 U. S. (O. C. App.) 281.

## **TITLE III.**

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**THE CONTRACT AND POLICY.**

(58)



## TITLE III.

### CONTRACT AND POLICY.

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#### CHAPTER II.

##### NATURE OF THE CONTRACT.

- § 16. Risk is an essential element.
- § 17. Division and distribution of loss are essential.
- § 18. Insurance is an aleatory contract.
- § 19. Insurance is a voluntary contract.
- § 20. Insurance is an executory contract.
- § 21. The contract is synallagmatic.
- § 22. Insurance is a conditional contract.
- § 23. Insurance is a personal contract.
- § 24. Insurance other than that of life and accident is a contract of indemnity.
- § 25. Indemnity stipulation as to value in policy.
- § 26. Life insurance is not a contract of indemnity.
- § 27. Accident insurance is not a contract of indemnity in all cases.
- § 28. Reinsurance is a contract of indemnity.
- § 29. Other incidents of the doctrine of indemnity.

§ 16. **Risk is an Essential Element.**—There must be a risk, since that is an essential element. It is of the very essence of insurance and forms the principal foundation of the contract. In other words, the insurer takes upon himself the peril which the property or interest of others is liable to encounter. The very life of the contract involves the presumption that the thing is or will be exposed to some danger. But the risk should be of a real loss which neither the insurer nor insured has the power to avert or hasten.<sup>1</sup> If the term “risk”

<sup>1</sup> See Emerigon on Insurance, Meredith's ed. 1850, c. i, pp. 4, 5; Hopkins' Marine Insurance, ed. 1867, 53, 55; 13 Encyclopedia Britannica, 161; Nye v. Grand Lodge, 9 Ind. App. 140, 141, per Lotz, J.

is used in a contract of insurance or reinsurance, the court must in case of doubt determine what the parties intended, having in view the whole contract, and the sense in which the word is used and the precise contract relations sustained by the parties to each other is important. The word, as ordinarily used, describes the liability assumed as specified on the face of the policy.<sup>2</sup> This risk or cause of loss against which it is intended to indemnify the assured<sup>3</sup> may, as a general rule, be any uncertain event which may in anywise be of disadvantage to the party insured,<sup>4</sup> provided always that said party has an insurable interest which is exposed thereto, or which may suffer damage or loss therefrom, and provided further that the risk is a legal one not in contravention of the provisions or obvious policy of the law, nor an infringement upon the rights of persons not parties to the contract, and that it does not arise from the fraud of the insured.<sup>5</sup> These points will, however, be fully considered under insurable interest, void and illegal insurances, wager policies, description of subject matter and property, risk and loss, etc.

**§ 17. Distribution of Loss an Essential Element.**— Another most important principle underlying the contract of insurance is that which minimizes the loss to the individual by a division and distribution of liability among a large number of persons who are subjected to like risks, and it follows as a necessary corollary, that the peril ought to happen only to a comparatively small number. This principle of division and distribution of loss is fully recognized by the text-writers and courts as fundamental. Thus, Maynes writes: "This most laudable custom of assurances whereby the danger and adven-

<sup>2</sup> *Continental Ins. Co. v. Aetna Ins. Co.*, 138 N. Y. 16, 20; 33 N. E. Rep. 724, per O'Brien, J., reversing, as to the construction of the word "risk" under the facts of the case: 17 N. Y. Supp. 106. See, also, *Pitcher v. Hennessey*, 48 N. Y. 415, where "risks of navigation" were held broader than "perils of navigation."

<sup>3</sup> 1 Phillips on Insurance, 3d ed., sec. 905. But see definition of the word "peril" in Marshall on Insurance, ed. 1810, 2, note a, which is: "In insurance the word 'peril' generally signifies the happening of the event or misfortune of which danger was apprehended."

<sup>4</sup> *Lucena v. Crawford*, 5 Bos. & P. 301, per Lawrence, J.

<sup>5</sup> See 1 Phillips on Insurance, 3d ed., 905, et seq.

ture of goods is divided, repaired, and borne by many persons consenting and agreed upon between them what part everie man will be contented to assure, make goode, and pay if any loss or casualltie should happen to the goods adventured, or to be adventured, at the seas as also by land, to the end that merchants might enlarge and augment their trafficke and commerce, and not adventure all in Bottome to their loss and overthrow, but that the same might be repaired and answered for by many.”<sup>6</sup> Substantially the same language was used in 1601, in the preamble to the Statute 43 Elizabeth, chapter 12, and also by Lord Bacon in his Abridgment.<sup>7</sup> So Willes, Lord Chief Justice, in *Pole v. Fitzgerald*,<sup>8</sup> says: “Insurances was at first invented for the benefit of trade, that if a merchant miscarried in one voyage he might not be ruined forever, but by giving premiums to other persons to insure either his ship or his goods, the loss, if it happened, might be divided amongst them, and so the merchant might be enabled to try his fortune in another voyage.” Again, the court, in *New York Life Insurance Company v. Statham*,<sup>9</sup> declares that “the business of insurance is founded on the law of average, that of life insurance eminently so. . . . By spreading their risks over a large number of cases the companies calculate on this average with reasonable certainty and safety.” And the court also says: “The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all, for out of the coexistence of many risks arises the law of average which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to on which the premiums and amounts assured are based.”<sup>10</sup>

§ 18. **Insurance is an Aleatory Contract.**—The derivation of this word embodies the idea of chance or uncertainty, and the contract is aleatory in the sense that it is dependent upon some contingent event: That the obligation of the insurer

<sup>6</sup> Maynes' *Lex Mercatoria*, ed. 1622, 146.

<sup>7</sup> Vol. 3, 4th ed., 593, 599.

<sup>8</sup> Willes, 641, 645.

<sup>9</sup> 93 U. S. 24, 31, 32.

<sup>10</sup> *Id.* 31.

is subordinated to certain perils. As we have already stated,<sup>11</sup> risk is an essential element of insurance, and neither the assurer nor insured can know whether the event will or will not happen, nor can either control the event to avert or hasten it. Therefore, since insurance depends upon some contingent event against the occurrence of which the contract is intended to provide, although it may never occur, it is an aleatory contract. It must be understood, however, that true insurance is always concerned with real value; it is not merely speculative, as in case of wager policies, but is intended to protect actual interests from possible losses. It is based upon certain facts and data required to be made known as far as ascertainable. It does not proceed upon concealed facts, since the chance or probability of the uncertain event happening or of the peril must be estimated beforehand with an approximate degree of certainty.<sup>12</sup>

**§ 19. Insurance is a Voluntary Contract.**—Insurance is a voluntary contract, and insurers have the right to impose conditions therein. If the assured objects to them, he is not bound to close the contract, but if he voluntarily enters therein, he will be bound thereby.<sup>13</sup> This of course relates to valid conditions, and those not prohibited by positive law nor against public policy.

**§ 20. Insurance is an Executory Contract.**—The contract of insurance is an executory contract in the sense that it is executed by the payment of the sum insured on a loss.<sup>14</sup> It is said in a New York case that "the contract (life) was not as to all its stipulations and as to both parties executory. It was executed by the plaintiff by the payment of the annual premiums from 1849 to and including 1861, while it was wholly

<sup>11</sup> Sec. 16.

<sup>12</sup> See Emerigon on Insurance, Meredith's ed. 1850, c. 1, sec. 3, pp. 11, 13; 1 May on Insurance, 3d ed., sec. 5; Hopkins' Marine Insurance, ed. 1867, 53, 58, 59, 299.

<sup>13</sup> Keim v. Home Mut. F. Ins. Co., 42 Mo. 33, 43; 97 Am. Dec. 291.

<sup>14</sup> Mutual L. Ins. Co. v. Wager, 27 Barb. (N. Y.) 354, 367. See New York L. Ins. Co. v. Statham, 93 U. S. 24.

executory on the part of defendant, its undertaking being to pay the amount specified upon the death of the insured."<sup>15</sup>

**§ 21. The Contract is Synallagmatic.**—Inasmuch the contract of insurance is a mutual agreement imposing certain reciprocal obligations upon the insurer and insured, it may be said to be synallagmatic whether the subject matter be of a marine character or a building or the life or health of a person, or any other insurable interest. "Pothier says that 'the contract of insurance is synallagmatic, for it produces reciprocal obligations. The insurer enters into an obligation to the assured to guarantee and indemnify him against the perils of the sea, and the assured binds himself in turn to the insurer to pay him the premium agreed upon.'"<sup>16</sup>

**§ 22. Insurance is a Conditional Contract.**—Insurance is a conditional contract in the sense that the contract may never attach even though the terms be agreed upon, as where the payment of the premium is a condition precedent or where some act is required to be performed by the assured in relation to the risk before the contract is completed. It is also conditional in the sense that the insurer is not obligated to pay unless the loss arises from the specified perils or where no risk attaches and no premium is due.<sup>17</sup> If the contract stipulates that in certain contingencies it shall be void and insures "against all direct loss or damage by fire except as hereinafter provided," it is a conditional contract. It is also conditional when it insures against loss to property "while located and contained as described herein and not elsewhere."<sup>18</sup> The court said in this case: "(a) The contract is declared upon as absolute and unconditional; it is alleged that by it the defendant did insure the plaintiff against all direct loss or damage by fire upon or to the property, etc. The contract in proof insures 'against all direct loss or damage by fire

<sup>15</sup> *Cohen v. Mutual L. Ins. Co.*, 50 N. Y. 619, per Allen, J.

<sup>16</sup> *Emerigon on Insurance*, Meredith's ed. 1850, c. i, sec. 2, pp. 5, 6.

<sup>17</sup> *Emerigon on Insurance*, Meredith's ed. 1850, c. i, sec. 3, p. 11; 1 *May on Insurance*, 3d ed., sec. 4; *McKee v. Metropolitan L. Ins. Co.*, 25 Hun. (N. Y.) 583, 584; *Tyrie v. Fletcher*, Cowp. 666, 668, per Lord Mansfield; *Stevenson v. Snow*, 3 Burr. 1237.

<sup>18</sup> *Coolidge v. Continental Ins. Co.*, 67 Vt. 14; 30 Atl. Rep. 798.



except as hereinafter provided,' and there are subsequent stipulations which provide that in certain contingencies the policy shall be void, such as loss caused by riot, etc. 'By the very terms of the contract it is conditional; it insures the plaintiff only in case the loss does not occur from the excepted causes. A contract to insure without limitation is not a contract to insure only in certain cases. (b) In another respect, the contract in proof is a conditional or qualified one. The declaration is upon a contract to insure the tinshop building and its contents. The company would be liable if the property burned, situated as described, when the policy was issued, and it might be liable in case of loss if the building was located elsewhere and the personal property contained in some other building.<sup>19</sup> The contract in proof insured the property 'while located and contained as described herein and not elsewhere.' This latter clause qualifies the contract, making it conditional."<sup>20</sup>

§ 23. Insurance is a Personal Contract.—It is well settled that insurance is a personal contract, whatever the subject matter of the insurance may be.<sup>21</sup> It is a contract by which the insurer undertakes to indemnify or pay money to the insured in the manner and subject to the conditions agreed upon. This liability of the insurer to pay money is not altered by the fact that such money may be expended in rebuilding under certain circumstances, as in a fire policy, nor that it may be paid out in defending suits against the title, or in testing its validity or in paying judgments rendered, as in case of title insurance. It is nevertheless a contract either to indem-

<sup>19</sup> Citing *Pelly v. Governer*, 1 Burr. 341; *Lyons v. Providence etc. Ins. Co.*, 14 R. I. 109.

<sup>20</sup> *Id.*, 27, 28, per Taft, J.

<sup>21</sup> *Carpenter v. Washington F. Ins. Co.*, 16 Pet. (U. S.) 495, 504, per Story, J.; *Columbia Ins. Co. v. Laurence*, 10 Pet. (U. S.) 507, 512; *Disbrow v. Jones Harr.* (Mich.) 48; *Adams v. Rockingham Ins. Co.*, 29 Me. 292, 294, per Tenney, J.; *Ætna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 885, 397; 30 Am. Dec. 90; *Lett v. Guardian F. Ins. Co.* 125 N. Y. 82, 86, per Gray, J.; *Raynor v. Preston*, L. R. 18 Ch. D. 1, 10, per Brett, L. J.; *McDonald v. Black*, 20 Ohio, 185, 192; 55 Am. Dec. 448; *Wyman v. Prosser*, 86 Barb. (N. Y.) 368; *Wyman v. Wyman*, 26 N. Y. 253.

nify the assured or to pay him a certain sum of money in case a certain casualty happens.<sup>22</sup> This obligation does not run with the property whether it be real estate or personalty, neither does it pass with the title unless assigned with the consent of the insurer,<sup>23</sup> or unless by extraordinary and express stipulation of the parties it is made to run with the subject matter,<sup>24</sup> or unless it be so framed as to be inseparably attached to the property and follow the successive owners during the continuance of the risk, such successive owners being in turn the parties really assured, as where the insurance is on account of the "owners," or for whom it may concern, or where the loss happens to be payable to "bearer," although this latter form rarely exists.<sup>25</sup> So where one insured real property, the insurance payable to himself, his executors, administrators, and assigns, the interest in the policy was held to pass to his executors in preference to his heirs.<sup>26</sup> The distinction which underlies this construction is that the thing is not insured but the right appertains to the person since the contract is not in its nature an incident to the property. The term formerly used was *aversio periculi*, it being the intention of all insurances to avert any damages or loss the insured might sustain.<sup>27</sup> In the case of *Lynch v. Dalzell*,<sup>28</sup> Chancellor King says: "These policies are

<sup>22</sup> See *Rayner v. Preston*, L. R. 18 Ch. D. 1, 9, per Brett, L. J.

<sup>23</sup> *Ætna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 397; 30 Am. Dec. 90; *Wilson v. Hill*, 3 Met. (Mass.) 66, 69; *Lett v. Guardian F. Ins. Co.*, 125 N. Y. 82, 86; *Disbrow v. Jones*, Harr. (Mich.) 48; *Cumming v. Insurance Co.*, 55 N. H. 457, 459; *Adams v. Rockingham Ins. Co.*, 29 Me. 292, 294; *Raynor v. Preston*, L. R. 18 Ch. D. 1, 9; *McDonald v. Black*, 20 Ohio St. 185, 192; 55 Am. Dec. 448.

<sup>24</sup> *Cummings v. Insurance Co.*, 55 N. H. 457, 459.

<sup>25</sup> See *Rogers v. Traders' Ins. Co.*, 6 Paige (N. Y.), 563, 588; 2 *Duer on Insurance*, ed. 1846, pp. 49, 50, sec. 31.

<sup>26</sup> *Wyman v. Prosser* (N. Y.), 36 Barb. 368.

<sup>27</sup> *Sadlers' Co. v. Babcock*, 2 Atk. 554, 556; *Cummings v. Cheshire etc. Ins. Co.*, 55 N. H. 457, 459; *Columbian F. Ins. Co. v. Laurence*, 10 Pet. (U. S.) 507, 512; *Wilson v. Hill*, 3 Met. (Mass.) 66, 69; *Patterson v. Powell*, 9 Bing. 322, per Coleridge, J., who says: "Every policy of insurance must insure some thing or person from some risk to which that thing or person is liable."

<sup>28</sup> 4 Bro. Cas. Parl. 432. This quotation is as reported in *Parke on Insurance*, ed. 1800, 453, and ascribed by him to Chancellor King, while in the above report it is apparently ascribed to counsel.

not insurances on the specific things mentioned to be insured nor do such insurances attach on the realty or in any manner go with the same as incident thereto by any conveyance or assignment, but they are only special agreements with the persons insuring against such loss or damage as they may sustain. The party insured must have a property at the time of the loss or he can sustain no loss and consequently can be entitled to no satisfaction."<sup>29</sup> So in a Massachusetts case<sup>30</sup> the court declared that "it has been repeatedly decided here that under the forms of our policies none but the parties to the contract or their legal representatives in case of their death can avail themselves of the contract although others may in fact have an equitable or even legal interest in the property insured. The only exception to this rule which has been admitted exists where a policy has been bona fide and for a valuable consideration assigned with notice to the underwriter and an assent on his part, either express or implied." And again it is said that the contract of insurance "appertains to the person or party to the contract, and not to the thing which is subjected to the risk against which its owner is protected. It is not a contract running with the land in the case of real estate nor running with the personalty, so to speak, in the case of a chattel interest of the insured."<sup>31</sup> There is, however, another class of cases where the question arises whether certain covenants to insure made between certain parties relative to land run with the land. Thus, a covenant to effect insurance and apply the proceeds in case of loss by fire to the reparation of the insured property, is held such a covenant as may run with the land.<sup>32</sup>

<sup>29</sup> Cited in *Carpenter v. Providence etc. Ins. Co.*, 16 Pet. (U. S.) 495, 503.

<sup>30</sup> *Carroll v. Boston M. Ins. Co.*, 8 Mass. 515, 517.

<sup>31</sup> *Cummings v. Cheshire etc. Ins. Co.*, 55 N. H. 457, 458.

<sup>32</sup> *Thomas v. Vonkapffs*, 6 Gill & J. (Md.) 372. Where interest need not be personal, see sec. 890, herein; *Masoury v. Southworth*, 9 Ohio St. 340. A builder who has entered into possession without a sale under a decree upon his contract of building made with the lessee, and insures the premises to the extent of his interest in the lease, the policy does not inure to the benefit of the lessor or his assigns, nor does it make the builder liable on the covenant of insurance in the lease: *Merchants' Ins. Co. v. Masange*, 22 Ala. 168. A covenant to keep premises insured

§ 24. **Insurance Other than that of Life and Accident is a Contract of Indemnity.**—It is elementary that the contract of insurance, other than that of life and of accident, where the injury results in death, is one of indemnity.<sup>33</sup> By indemnity is meant that the party insured is entitled to be compensated for such loss as is occasioned by the perils insured against, in precise accordance with the principles and terms of the contract of insurance. The right to recover being commensurate with the loss sustained,<sup>34</sup> or with the amount specified, as in cases of life insurance and valued policies. It is not intended by insurance that the party insured shall be put in exactly the same situation as he might have been had there been no loss, although he may be restored as nearly as may be to the condition he was at the outset.<sup>35</sup>

for a certain sum during the term, in companies approved by the lessor or lease to be forfeited, does not tend to renew prior policy covering lessor's own interest, but lessee may insure respective interests of lessor and self: *Sherwood v. Harral*, 39 Conn. 333. See, further, as to covenants to insure: *Eberts v. Fisher*, 54 Mich. 294; *Rhone v. Gale*, 12 Minn. 54; *Whitaker v. Hawley*, 25 Kan. 674; 37 Am. Rep. 277. *Examine Hidden v. Slater Mut. F. Ins. Co.*, 2 Oliff. (O. C.) 266.

<sup>33</sup> *McDonald v. Black*, 20 Ohio St. 185; 55 Am. Dec. 448; *Glendale W. Co. v. Protection Ins. Co.*, 21 Conn. 19, 30, 31; 54 Am. Dec. 309; *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141; 25 Am. Dec. 363; *Morrison v. Tenn. Ins. Co.*, 18 Mo. 262; 59 Am. Dec. 299; *Bosley v. Chesapeake Ins. Co.*, 3 Gill & J. (Md.) 468, per Dorsey, J.; *Insurance Co. v. Insurance Co.*, 38 Ohio St. 15; *Insurance Co. v. Butler*, 38 Ohio St. 133; *Johannes v. Phoenix Ins. Co.*, 66 Wis. 50, 53; 57 Am. Rep. 248; *Darrell v. Tibbitts*, L. R. 5 Q. B. D. 560, 562, 563; *Castellain v. Preston*, L. R. 11 Q. B. D. 380, 386; *Cummings v. Insurance Co.*, 55 N. H. 457, 458; *Cross v. National F. Ins. Co.*, 132 N. Y. 133, 135; *Bevin v. Connecticut Mut. L. Ins. Co.*, 23 Conn. 244, 251; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 205, 208; 78 Am. Dec. 418; *Lloyd v. Fleming*, L. R. 7 Q. B. 299, 302; *Rawls v. American L. Ins. Co.*, 36 Barb. (N. Y.) 357, 362; 84 Am. Dec. 280; *Wilson v. Hill*, 3 Met. (Mass.) 66, 68; *Insurance Co. v. Bailey*, 13 Wall. (U. S.) 618, per Clifford, J.; *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 256, 269; 94 Am. Dec. 65; *Powells v. Innes*, 11 Mees. & W. 10, 13. See *Aitchison v. Lohre*, 4 L. R. App. C. 755, 761; 49 L. J. Q. B. D. 123; 41 L. T., N. S., 323.

<sup>34</sup> *Franklin F. Ins. Co. v. Hamill*, 6 Gill & J. (Md.) 87, 95; *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; 54 Am. Dec. 309; *Carpenter v. Providence etc. Ins. Co.*, 16 Pet. (U. S.) 503; *Kemp v. Vigne*, 1 Term. Rep. 809; *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 205; 78 Am. Dec. 418.

<sup>35</sup> *Commonwealth Ins. Co. v. Sennett*, 37 Pa. St. 205, 208; 78 Am.

### § 25. Indemnity—Stipulation as to value in Policy.—

It has been said that insurance is not a perfect contract of indemnity in that the parties may agree beforehand in estimating the value of the subject assured as the measure of damages.<sup>36</sup> The fact, however, that the sum to be paid is agreed upon beforehand makes in itself the contract no less one of indemnity, because the value is so fixed in order that the insured may have an indemnity and no more, since if there be a gross and fraudulent overvaluation it may be inquired into, and it is ordinarily to the insured's advantage to see that there is not an undervaluation, and that the amount be fixed sufficiently large to constitute an indemnity.<sup>37</sup> If, however, a valued policy is bona fide meant as an indemnity, the courts will not inquire very minutely whether the valuation be very near the true interest of the assured. This is the rule stated by Marshall, and accords with that given by the courts.<sup>38</sup> So it is held in New York that an overvaluation does not per se render a valued marine policy void. In the absence of fraud, accident, or mistake the valuation agreed upon is conclusive

Dec. 418; *Hopkins' Marine Insurance*, ed. 1867, 59; 2 *Phillips on Insurance*, 3d ed., 38, sec. 1220. See *Woods' Mayne on Damages*, 1st Am. ed., sec. 439; 2 *Sedgwick on Damages*, 8th ed., sec. 722, et seq.; *Times F. Assur. Co. v. Hanke*, 1 Fost. & F. 406.

<sup>36</sup> "A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured by way of liquidated damages, as indeed they may in any other contract to indemnify": *Irving v. Manning*, 1 H. L. Cas. 303, 307, opinion of the judges. This case is cited in *Aitchison v. Lobre*, L. R. 4 App. Cas. 755, 761, per Blackburn, J., and one of the qualifications stated is that of the allowance of one-third new for old in marine risks: See *Hamilton v. Mandes*, 2 Burr. 1198, 1210, per Lord Mansfield.

<sup>37</sup> See *Voison v. Commercial Mut. Ins. Co.*, 62 Hun, (N. Y.) 10, 11, per Daniels, J., 41 N. Y. 889; *Lewis v. Rucker*, 2 Burr. 1171; *Clark v. Ocean Ins. Co.*, 16 Pick. (Mass.) 289; *Shane v. Felton*, 2 East. 109; *Wolcott v. Eagle Ins. Co.* 4 Pick. (Mass.) 429; *Marine Ins. Co. v. Hodgson*, 6 Cranch (U. S.), 220; 7 Cranch (U. S.), 332; *Natchez & New Orleans etc. Co. v. Louisville Underwriters*, 44 La. Ann. 714, 11 S. Rep. 54, where actual value exceeded value specified, and assured was held bound by value stated: 1 *Marshall on Insurance*, ed. 1810, 238, 291.

<sup>38</sup> *Marshall on Marine Insurance*, ed. 1810, 291; *Miner v. Tagert*, 3 Binn. (Pa.) 204. See, also, *Hodgson v. Marine Ins. Co.*, 5 Cranch (U. S.), 100, 110; 6 Cranch (U. S.), 206; 7 Cranch (U. S.), 332.

and binding, however largely in excess of the true value. Overvaluation is simply presumptive evidence of fraudulent intent strong in proportion to the excess, which presumption may be repelled by proof.<sup>39</sup> Again, in case of partial loss in valued policies an inquiry may be made as to the amount of loss as a basis upon which to indemnify the assured.<sup>40</sup> Therefore, the fact that the amount is fixed in a valued policy where the pecuniary value of the subject of insurance is capable of being estimated makes the contract none the less one of strict indemnity, the only difference being that the money value or indemnity is, as far as may be possible, determined before instead of after the loss. So Mr. Phillips says: <sup>41</sup> "The valuation in a valued policy is a mere substitute as between the parties for the computation or estimate of the value of the subject in an open policy." <sup>42</sup> Nor does the valuation preclude an inquiry as to the amount of interest at stake, for it may be shown that only part of the property was at risk,<sup>43</sup> the valuation being assumed to be based upon the principles of indemnity in all valued policies.

**§ 26. Life Insurance not a Contract of Indemnity.—** Although the question of indemnity as related to life insurances has been prolific of much discussion by both text-writers and the courts, yet the weight of authority is that life insurance is not a contract of indemnity. In *Godsall v. Boldero*,<sup>44</sup>

<sup>39</sup> *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77; *Watson v. Insurance Co. of North America*, 3 Wash. (C. C.) 1, 2; *Borden v. Hingham Mut. F. Ins. Co.*, 18 Pick. (Mass.) 523; 29 Am. Dec. 614, and note, 616, 621. Under following heads: "'Overvaluation of insured property,' 'fraudulent overvaluation avoids policy,' 'rule applies both to valued and to open policies,' 'where overvaluation not fraudulent,' 'overvaluation contrary to warranty or condition in policy,' 'examinations of property by agent'": *Helbig v. Svea Ins. Co.*, 54 Cal. 156; 35 Am. Rep. 72, and note 74, 76.

<sup>40</sup> *Watson v. Insurance Co. of North America*, 3 Wash. (C. C.) 1, 2; *Clark v. United Ins. Co.*, 7 Mass. 385; 5 Am. Dec. 50. See 1 Arnould on Marine Insurance, Perkins' ed. 309, \*304, et seq.

<sup>41</sup> 2 Phillips on Insurance, 3d ed., sec. 1188.

<sup>42</sup> See, also, 1 Arnould on Marine Insurance, Perkins' ed. 1850, 315, \*309, et seq.; MacLachlan's ed. 1887, 299, et seq.; *Forbes v. Aspinall*, 13 East, 327.

<sup>43</sup> *Forbes v. Aspinall*, 13 East, 327.

<sup>44</sup> 9 East, 72.

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which was for a long time a leading case, a creditor insured his debtor's life. After the debtor's death and before action brought, his executors paid the debt, and the court held that such payment took away the ground of action.<sup>45</sup> The court relied upon the case of *Hamilton v. Mendes*,<sup>46</sup> which was a case of marine insurance. The ruling was followed in other cases, although there were conflicting decisions until the law became settled upon the authority of *Dalby v. India and London Life Insurance Company*,<sup>47</sup> which expressly overruled *Godsall v. Boldero*. The question was well considered both by the court and in the arguments of counsel, and it was there determined that life insurance in no way resembled a contract of indemnity.<sup>48</sup> While a life is not a subject of valuation

<sup>45</sup> Lord Ellinborough, C. J., declared "that if, before the action was brought, the damage which was at first supposed likely to result to the creditor from the death of Mr. Pitt (the insured) were wholly obviated by the payment of his debt to them, the foundation of any action on their (the plaintiffs') part, on the ground of such insurance, fails": *Godsall v. Boldero*, 9 East, 72, 81.

<sup>46</sup> 2 Burr. 1210.

<sup>47</sup> 15 Com. B. 365.

<sup>48</sup> It was there declared that "the contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always, except when bonuses have been given by prosperous offices, the same on the other. This species of insurance in no way resembles a contract of indemnity." The reasoning in this case seems to be based upon the construction of the statute 14 George III., chapter 48, clause 3, which provides "that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the assured in such life or lives or other event or events." This was held to mean that "if there is an interest at the time of the policy, it is not a wagering policy, and that the true value of that interest may be recovered in exact conformity with the words of the contract itself"; that "the only effect of the statute is to make the assured value his interest at its true amount when he makes the contract," and that the contract "really is what it is on the face of it, a contract to pay a certain sum in the event of death. It is valid at the common law, and if it is made by a person having an interest in the duration of the life, it is not prohibited by the statute, 14 George III., chapter 48": *Id.*, per opinion Parke, B.

itself,<sup>49</sup> nor the loss adjustable on any principle of indemnity, still the amount of insurable interest in a life can sometimes be estimated as in case of the insurance by a creditor of the life of his debtor, so much so that it has been held that in case of a gross disproportion between the amount of the insurance and the debt secured thereby it may be declared a wager policy.<sup>50</sup> So, perhaps, in other cases where the insurable interest is a pecuniary one it may be valued in the sense that the interest might be assumed to be equal in amount to the sum insured,<sup>51</sup> and therefore a life policy might be said to resemble a valued marine policy, and in so far as the insurable interest in the former is capable of being approximately estimated upon a pecuniary basis that that establishes a measure of indemnity, and therefore constitutes life insurance a contract of indemnity, and that the fact that the amount is fixed in a life policy makes it differ in no wise from a valued marine policy. This conclusion, however, cannot follow when it is considered that the nature of the two contracts differs in many respects. Thus, in life risks the premium depends upon data based upon the duration of human life, and the event must happen. In other risks the data for fixing rates of premium depends upon an uncertain event which may or may not happen.<sup>52</sup> Again, in the one case the contract is based on a pecuniary interest, while in a life risk the interest need not necessarily be strictly and exclusively a pecuniary one, as in case of consanguinity or affinity.<sup>53</sup> Another distinction is that in marine, fire, and

<sup>49</sup> Life insurances are, says Mr. Bunyon, independent of the value of the subject matter: Bunyon on Life Insurance, ed. 1867, 7. And the court in *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 460, declares that "In life insurance the loss can seldom be measured by pecuniary values": per Bradley, J.

<sup>50</sup> *Cooper v. Schaeffer* (Pa.), 11 Atl. Rep. 548; 20 Week. Not. Cas. 123; 9 Cent. Rep. 601; 17 Ins. L. J. 152. But see *Grant v. Kline*, 115 Pa. St. 618, 9 Atl. Rep. 150, 7 Cent. Rep. 628, where the insurance was for three thousand dollars, and the debt less than eight hundred, and the disproportion was not considered too great.

<sup>51</sup> See 2 Phillips on Insurance, 3d ed., 35, secs. 1216, 1217.

<sup>52</sup> Loss certain to occur in life and not in fire and marine insurances: *Nye v. Grand Lodge A. O. U. W.*, 9 Ind. App. 140, per Lots, J.

<sup>53</sup> "An insurance upon life has in fact but a remote resemblance to a marine or fire insurance. In the latter the particular object is to in-



other insurances of like nature the interest must exist at the time of the loss, or there can be no recovery,<sup>54</sup> while in life insurance the interest need only exist at the time the insurance is effected,<sup>55</sup> unless such be the necessary effects of the provisions of the insurance itself.<sup>56</sup> Again, in life policies there is no distinction between total and partial losses, but upon the loss occurring the insurer is bound to pay, according to the terms of

demnify against a pecuniary loss; and the event upon which the money is made payable is the happening of the loss, the contract being in terms to pay whatever is lost, not exceeding a specified sum. But a life insurance is a contract to pay a specific sum on the happening of a particular event which may or may not occasion a pecuniary loss. Where that event is the death of the insured himself, there is nothing like an indemnity against loss to him, for he can never receive the money": *Trenton Mut. L. Ins. Co. v. Johnson*, 24 N. J. L. 576, 585, per Elmer, J. See *Halford v. Kymer*, 10 Barn. & C. 724; *Insurance Co. v. Bailey*, 13 Wall. (U. S.) 616, 618, 619, per Clifford, J.; *Appeal of Carson's Exr.*, 113 Pa. St. 438, 443, 444, per Clark, J.; *Warwick v. Davis*, 14 Otto (U. S.), 775, 779, per Field, J.; *Loomis v. Insurance Co.*, 6 Gray (Mass.), 39. Held, in *Mutual L. Ins. Co. v. Allen*, 138 Mass. 27, 52 Am. Rep. 246, 247, that pecuniary interest in life not necessary. See, also, necessity of pecuniary interest: *Carpenter v. United States L. Ins. Co.*, 161 Pa. St. 9, 15, 16, per Dean, J.; *Nye v. Grand Lodge*, 9 Ind. App. 142. It was, however, held in England under the statute 14 George III., chapter 48, that there must be a pecuniary interest in the life or event insured: *Halford v. Kymer*, 10 Barn. & C. 724; 1 Phillips on Insurance, 3d ed., 201, sec. 356. "But the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the cestui qui vie are founded in an erroneous view of the nature of the contract": *Insurance Co. v. Bailey*, 13 Wall. (U. S.) 616, 618, 619. A wife, however, might in England insure the life of her husband without other proof of interest than the relation between them: *Reed v. Royal Exchange Assur. Co.*, Peake Add. Cas., Peake, N. C., 3d ed., pt. ii. See Bunyon on Life Insurance, ed. 1868, 6.

<sup>54</sup> *Sadlers' Co. v. Babcock*, 2 Atk. 554; *Insurance Co. v. State Ins. Co.*, 16 Or. 283.

<sup>55</sup> *Appeal of Carson's Exr.*, 113 Pa. St. 438, 447; *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 282; 36 Barb. (N. Y.) 357; 84 Am. Dec. 280; *Mowry v. Home L. Ins. Co.*, 9 R. I. 346; *McKee v. Phoenix Ins. Co.*, 23 Mo. 383; 75 Am. Dec. 129; *Dalby v. India etc. Life Assur. Co.*, 15 Com. B. 365; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457.

<sup>56</sup> *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192; *Sides v. Knickerbocker L. Ins. Co.*, 16 Fed. Rep. 650.

his agreement, the full sum insured.<sup>57</sup> Again, in a life policy the element of damage is not dependent upon the payment or nonpayment of the debt, nor the payment of the amount of pecuniary interest by third parties. The insurable interest is inquired into beforehand by the insurers to prevent speculative insurances which are against public policy, and it is sufficient in all life policies that the contract is not involved as a wager policy, although, of course, it may be voided for fraud, but as we have said, the question as to interest is limited in case of loss to that of whether the policy is within that class denominated wagers. The question of fraud should be eliminated in determining whether life insurance is or not a contract of indemnity, for fraud vitiates all contracts. But in the case of a valued marine policy the inquiry is not thus restricted, as where the owner's interest in a valued policy is diminished to the extent of a loan on bottomry to pay for repairs.<sup>58</sup> So in a valued marine policy the insurer may show that either by mistake or design the whole of the property insured was not shipped, and thus entitle himself to a proportionate deduction from the valuation of the policy.<sup>59</sup> To carry the argument still further, if life insurance is a contract of indemnity in any case whatsoever, then since by indemnity is meant a full indemnity, and no more, it must be conceded that the question may be opened to the extent of determining whether the party intended to be benefited has been indemnified or not, as in the case of *Godsall v. Boldero*,<sup>60</sup> and that ruling must then be held

<sup>57</sup> *Kennedy v. New York L. Ins. Co.*, 10 La. Ann. 809, 811, citing *Annesley*, 207; *Loomis v. Eagle L. & H. Ins. Co.*, 6 Gray (Mass.), 398, 399, per Shaw, C. J., quoting from *Park on Insurance*, 7th ed., 645; *St. John v. American Mut. L. Ins. Co.*, 2 Duer (N. Y.), 419, 434. In the last case the court, notwithstanding it admits that there is no distinction between total and partial losses in life insurance, nevertheless asserts that life insurance is a contract of indemnity. This case, however, is not the law of New York, since the rule there seems to be that life insurance is not a contract of indemnity: *Ferguson v. Mutual Life Ins. Co.*, 32 Hun (N. Y.), 306, 310, 311, et seq.; affirmed, 102 N. Y. 647; *Rawls v. American Mut. L. Ins. Co.*, 36 Barb. (N. Y.) 357, 362; 84 Am. Dec. 280; affirmed, 27 N. Y. 282, 239.

<sup>58</sup> *Read v. Mutual Safety Ins. Co.*, 3 Sand. (N. Y.) 54.

<sup>59</sup> *Atlantic Ins. Co. v. Lunar*, 1 Sand. (N. Y.) 91.

<sup>60</sup> 9 East, 72.

to govern. This conclusion is irresistible, as was fully realized by the six judges who in the exchequer chamber expressly overruled that case in *Dalby v. India etc. Company*,<sup>61</sup> and held unequivocally that life insurance was not a contract of indemnity, and how an agreement to pay a fixed sum, and one in which the premium is based upon the duration of human life and an event which is bound to occur and which differs in so many essentials, can be held to be a contract of indemnity is hardly conceivable without also conceding that *Godsall v. Boldero*<sup>62</sup> determines the law, and if so, the rule *stare decisis* should obtain, notwithstanding the injustice of that decision was so great that Mr. Bunyon,<sup>63</sup> evidently speaking for the profession, attacked it on that ground, among others, and predicted that it would be overruled.<sup>64</sup> As was thereafter done in *Dalby v. India etc. Company*,<sup>65</sup> wherein the judges also declared that

<sup>61</sup> 15 Com. B. 365. See *Ferguson v. Massachusetts Mut. L. Ins. Co.*, 32 Hun (N. Y.), 312, per Hardin, J., affirming *Dalby v. India etc. case*, affirmed 102 N. Y. 647.

<sup>62</sup> 9 East, 72.

<sup>63</sup> Bunyon on Life Assurance, sec. 7.

<sup>64</sup> This author, who wrote (1853) before the decision in *Dalby v. India etc. Assur. Co.*, 15 Com. B. 365 (1854), gives much consideration to this question, and determines that life insurance is not a contract of indemnity. He strongly disapproves the ruling in *Godsall v. Boldero*, 9 East, 72, and says that there are the greatest difficulties in considering the contract as that of an indemnity apart from the statute 14 George III., chapter 48, and that the principle upon which the decision is based is the assumed common-law doctrine rather than the words of the act, and he adds: "So great is the injustice involved in it that in practice it is universally rejected. . . . The officers themselves . . . have not found it to be for their benefit to act upon the rigid rule of law, but generally pay without inquiry." He further says: "So strong appears the feeling at the present time in the profession against this decision, that it is by no means improbable that it may be shortly reviewed in a higher court than that in which it was decided." This author also asserts: "A whole life policy is not like a fire or marine assurance made for a short period, and renewable with the consent of both parties, but is a contract to receive a sum of money upon an event which, although deferred, will certainly happen, and, although renewed from year to year by the payment of an annual premium, the premium is so calculated that the right of renewal rests with the assured, and is a portion of the consideration for which all past premiums have been paid": Bunyon on Life Assurance, 79 Law Library, \*22, \*24.

<sup>65</sup> 15 Com. B. 365.

the injustice of the decision was so great that but a few offices had availed themselves of it. We have shown in a prior section<sup>66</sup> that although the amount may be agreed upon beforehand, as in case of valued marine policy, nevertheless that does not alter the fact that an indemnity is intended in such policies, and although a life policy may be a valued one, the similarity extends no further. We conclude, therefore, as we first asserted, that the weight of authority is that life insurance is not a contract of indemnity.<sup>67</sup>

<sup>66</sup> Sec. 25.

<sup>67</sup> The following authorities hold that it is not a contract of indemnity: *Dalby v. India etc. Co.*, 15 Com. B. 365; *Nye v. Grand Lodge*, 9 Ind. App. 139, per *Lots, J.*; *Law v. London Indis. L. Pol. Co.*, 1 Kay & J. 228, 229; *Whiting use of Sun Mut. Ins. Co. v. Independent Mut. Ins. Co.*, 15 Md. 297, 327; *Trenton Mut. etc. Ins. Co. v. Johnson*, 24 N. J. L. 585; *Rawls v. American Mut. L. Ins. Co.*, 36 Barb. (N. Y.) 357; 27 N. Y. 282, 289; 84 Am. Dec. 284; *Ferguson v. Mutual L. Ins. Co.*, 32 Hun (N. Y.), 311, 312; affirmed 102 N. Y. 647; *Bunyon on Life Insurance* (79 Law Library), \*7-24; *Mowry v. Home L. Ins. Co.*, 9 R. I. 346, 354; *Scott v. Dickson*, 108 Pa. St. 6; 56 Am. Rep. 192; *Mutual L. Ins. Co. v. Allen*, 138 Mass. 27; 52 Am. Rep. 246, 247; *Emerick v. Coakley*, 35 Md. 188, 193. See, also, *Sweet's Dict. Eng. Law*, ed. 1882, "Insurance." The following authorities hold that it is not strictly a contract of indemnity, or, in other words, it is in the nature of an indemnity, as in case where a creditor insures his debtor's life: *Bacon's Benefit Societies and Life Insurance*, sec. 163; *Miller v. Eagle L. & H. Ins. Co.*, 2 E. D. Smith, 294, 295. "Policies of life insurance are governed in some respects by different rules of construction from those applied by the courts in case of policies against marine risks or policies against loss by fire. Marine and fire policies are contracts of indemnity by which the claim of the insured is commensurate with the damages he sustained by the loss of or injury to the property insured. . . . Life insurances have sometimes been construed in the same way, but the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui qui vie* are founded in an erroneous view of the nature of the contract, that the contract of life insurance is not necessarily merely one of indemnity for a pecuniary loss, as in marine and fire policies, that it is sufficient to show that the policy is not invalid as a wager policy if it appear that the relation, whether of consanguinity or of affinity, was such between the person whose life was insured and the beneficiary named in the policy as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured. Insurers, in such a policy, contract to pay a certain sum in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the assured to recover if it appear that the stipulated event has

**§ 27. Accident Insurance is not a Contract of Indemnity in all Cases.**—Accident insurance is not a contract of indemnity in all cases. It only indemnifies against the effect of

happened, and that the party effecting the policy had an insurable interest such as is described in the life of the person insured at the inception of the contract; as the contract is not merely for an indemnity, as in marine and fire policies": *Insurance Co. v. Bailey*, 13 Wall. (U. S.) 616, 618, et seq., per Clifford, C. J. The following authorities hold that it is a contract of indemnity: *Godsall v. Boldero*, 9 East, 72, which was overruled as noted in the text; *St. John v. American Mut. L. Ins. Co.*, 2 Duer (N. Y.), 419, 434, not the law of New York as noted in the text; *Bevin v. Connecticut Mut. L. Ins. Co.*, 23 Conn., 244, 251; *Kennedy v. New York L. Ins. Co.*, 10 La. Ann. 809, 810, where Merrick, C. J., says: "The contract of insurance is one of indemnity, but in life insurance the amount of the indemnity, we think, like a valued policy, is agreed upon beforehand": See note 2 *Smith's Lead. Cas.* (44 Law Lib. 203, 207), 165, 170. "A distinction has sometimes been taken between marine and other insurances and life insurance, on the ground that while the former have for their object to indemnify for loss, the latter is an absolute engagement to pay a fixed sum on the happening of a certain event, without reference to any damage in fact suffered by the insured in consequence. But this distinction is superficial, and rests rather upon the mode of determining the amount of indemnity than upon any difference in principle. There is the same difference, having reference to the question of indemnity, between valued and open policies, in both fire and marine insurance, that there is between an open policy in either and a policy of life insurance. In open policies the question of the amount of indemnity is left to be determined when the contingency upon which it becomes due shall have happened, while in valued policies and policies on lives the value of the interest which the insured seeks to protect is agreed upon by the parties, and inserted in the policy, and so the amount of indemnity which shall become due on the happening of the given contingency is predetermined. The purpose in all cases is alike—indemnity for the loss of a valuable interest": *May on Insurance*, 3d ed., sec. 7. See, also, *Id.* sec. 117. Mr. Marshall speaks of life insurance as an expedient by which a pecuniary indemnity may be secured to the beneficiaries: (*Book 3, c. 1, p. 766, ed. 1810*); and he notes (*Id.*, p. 777) the case of *Godsall v. Boldero*, which at that time had not been overruled, and says: "They hold that this insurance, like every other to which the law gives effect, is in its nature a contract of indemnity as distinguished from a wager. Mr. Phillips (1 *Phillips on Insurance*, sec. 3), says that the contract is now considered "as extending not only to indemnity against sea risks, fire, or land, and death, but," etc. This author, however, wrote before *Godsall v. Boldero*, 9 East, 72, was overruled. The code definition of insurance in California is thought by Mr. Deering to imply that life insurance is a contract of indemnity in that state (*Deering's Annot. Civ. Code Cal.*, sec. 2527, and note), although he does not discuss the question.

accidents resulting in bodily injuries. In case of death occasioned thereby it can in no sense be said to indemnify, because in such case there is a close analogy between accident and life insurance.<sup>68</sup> So it is said that accident insurance indemnifies in a certain sense against the pain and loss connected with the immediate accident, except in case of death.<sup>69</sup>

**§ 28. Reinsurance is a Contract of Indemnity.**—Reinsurance is a contract of indemnity and binds the reinsurer to pay the reinsured the whole loss sustained in respect of the subject insured to the extent for which he is reinsurer.<sup>70</sup>

**§ 29. Other Incidents of the Doctrine of Indemnity.** Since the doctrine of indemnity contemplates that the insured shall be indemnified, but shall never be more than fully indemnified, for a loss, there have necessarily arisen many incidents or corollaries thereto, such as the doctrines of constructive total loss, of abandonment, of subrogation, contribution, and apportionment of loss, etc., which will be noticed hereafter under their appropriate heads.<sup>71</sup>

<sup>68</sup> See *Bradburn v. Great Western Ry. Co.*, 23 Week. Rep. 48.

<sup>69</sup> *Theobald v. Railway Pass. Assur. Co.* 26 Eng. L. & Eq. 432, 437, 440. But in *Healey v. Mutual Acc. Assn.*, 133 Ill. 556, 560, 31 Cent. L. J. 419, where it is said that the purpose of accident insurance is to furnish indemnity against accidents and death caused by accidental means. This, however, appears to be a mere general statement of the court, made incidentally in connection with the question of construction.

<sup>70</sup> See *Hone v. Mutual S. Ins. Co.*, 1 Sand. (N. Y.) 137; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Mutual S. Ins. Co. v. Hone*, 2 N. Y. 235, 240. Examine *Bartlett v. Fireman's Ins. Co.*, 77 Iowa, 155, 158; 41 N. W. Rep. 601, where it was said an agreement to reinsure is an undertaking entered into with the insurer "to indemnify the owner of the insured property in case a loss occurs." See sec. 97, herein.

<sup>71</sup> *Brett, J.*, in *Castellain v. Preston*, L. R. 11 Q. B. D. 380; *Cincinnati Ins. Co. v. Duffield*, 6 Ohio St. 200, 67 Am. Dec. 339, where it is held that the legal effect of an abandonment in the sense in which it is used in policies of marine insurance and in the law regulating that subject, is to operate as a transfer to the underwriter by the party insured, but only to the extent of the indemnity contemplated by the policy: See chapters herein on Abandonment and Total Loss.

## CHAPTER III.

### PAROL CONTRACTS.

- § 31. Contract need not be in writing: Parol contract and rule in England.
- § 32. Same: The common-law rule.
- § 33. Same: Statutory regulations—English Stamp Acts.
- § 34. Parol contracts—Mutual benefit societies.
- § 35. Parol contracts—Statutory or charter provisions.
- § 36. Parol contracts—Statutory or charter provisions—continued.
- § 37. Parol contract for insurance subject to usual provisions of policy.
- § 38. Parol agreement for insurance may be specifically enforced, or court may award damages.
- § 39. Parol contract—Statute of frauds.
- § 40. How far parol contract merged in written agreement.
- § 41. Parol contract—Renewal.

§ 31. **Contract Need not be in Writing—Parol Contract—Rule in England.**—The contract of insurance need not be a specialty nor even in writing, for it is well settled law that a parol contract of insurance is valid in the absence of a statutory requirement to the contrary, and this rule covers not only agreements to insure,<sup>1</sup> but the completed contract.<sup>2</sup> Such con-

<sup>1</sup> See *Fish v. Cottenett*, 44 N. Y. 538; 4 Am. Rep. 715; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415; 11 Am. St. Rep. 674; *British Ins. Co. v. Lambert*, 26 Or. 199; 37 Pac. Rep. 909; *Croft v. Hanover F. Ins. Co.* (W. Va. 1895), 21 S. E. Rep. 854. Contracts and policies do not require seal: *Mill's Annot. Stat. Col.* (1891), c. 67, sec. 2227.

<sup>2</sup> *Sanborn v. Fire Ins. Co.*, 16 Gray (Mass.), 448; 77 Am. Dec. 419; *Newark Mach. Co. v. Renton Ins. Co.* (Ohio, 1894), 35 N. E. Rep. 1060; *Stickley v. Mobile Ins. Co.*, 37 S. C. 56; 16 S. E. Rep. 280; *Humphrey v. Hartford F. Ins. Co.*, 15 Blatchf. (C. C.), 35, 37; *Vrete v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83; *Ellis v. Albany City Ins. Co.*, 50 N. Y. 402; 10 Am. Rep. 495; *Stoehle v. Hahn*, 55 Ill. App. 497; *Northwestern Ins. Co. v. Aetna Ins. Co.*, 23 Wis. 160; 99 Am. Dec. 145; *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252; 9 Ins. L. J. 577; *Gold v. Sun Ins. Co.*, 73 Cal. 216; 14 Pac. Rep. 786; *Commercial Union Assur. Co. v. State*, 113 Ind. 331; *Relief F. Ins. Co. v. Shaw*, 94 U. S.

tract must, however, be clearly established, or the court will refuse relief either at law or in equity,<sup>3</sup> and evidence of usage to make written applications is immaterial.<sup>4</sup> In the following

574; *Hartford F. Ins. Co. v. Farrish*, 73 Ill. 166; *Emery v. Boston M. Ins. Co.*, 138 Mass. 398; *Stehlich v. Mechanics' Ins. Co.*, 87 Wis. 322; 58 N. W. Rep. 359; *Harron v. City of London F. Ins. Co.*, 88 Cal. 16; 25 Pac. Rep. 982; *Dodd v. Gloucester Ins. Co.*, 120 Mass. 408; *Hartford F. Ins. Co. v. Wilcox*, 57 Ill. 180; *Matthews v. Union M. A. Assn.*, 78 Wis. 588; 11 Law Rep. 83; *Smith v. Odlin*, 4 Yeates (Pa.), 468; *First Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y. 305; *Union Ins. Co. v. Commercial Ins. Co.*, 2 Curt. (C. C.) 524; 19 How. (U. S.) 318; *Patterson v. Benjamin Franklin Ins. Co.*, 81 Pa. St. 454; *Mobile M. Ins. Co. v. McMillan*, 31 Ala. 711; *Machine Co. v. Insurance Co.*, 50 Ohio St. 549; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371. See *Home Ins. Co. v. Adler*, 71 Ala. 516; *Strolin v. Hartford Ins. Co.*, 33 Wis. 648. Policy need not be issued, and if no date is mentioned takes effect immediately: *Potter v. Phoenix Ins. Co.*, 63 Fed. Rep. 382. As to marine insurances, see 1 *Duer on Insurance*, ed. 1845, 60, sec. 5. See *Morgan v. Mather*, 2 Ves. Jr. 15 and n. Contra, *Bell v. Western M. & F. Ins. Co.*, 5 Rob. (N. Y.) 423; 39 Am. Dec. 542; *Cockerell v. Cincinnati Ins. Co.*, 16 Ohio, 148. In this case the court says: "It is universal commercial usage that the policy shall be in writing, and there is no exception to it in positive decision or municipal regulation. Such a thing as a verbal policy is unknown to the law of insurance, and the books upon the subject and decisions unite in declaring that a policy must be in writing." It here appeared that the act incorporating the company required their contract to be in writing, but the court also said that "without the act we should hold that a policy of insurance upon the principle of general usage must be in writing, as supported and declared by universal authority." But see *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; 15 Am. Rep. 612. It should be remembered that a policy is the contract reduced to writing.

<sup>3</sup> *N. E. Ins. Co. v. Robinson*, 25 Ind. 536; *Patterson v. Benjamin Franklin Ins. Co.*, 81 Pa. St. 454; *McCann v. Aetna Ins. Co.*, 3 Neb. 198; *Dwinnig v. Phoenix Ins. Co.*, 68 Ill. 414; *Suydam v. Columbus Ins. Co.*, 18 Ohio St. 459; *Strolin v. Hartford Ins. Co.*, 37 Wis. 625.

<sup>4</sup> *Emery v. Boston M. Ins. Co.*, 138 Mass. 398. In this case the court, per Allen, J., said: "But it is also well settled, and it is now too late to question the doctrine, that an oral contract of insurance may be valid: *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 448. As was said in that case: 'It is not easy to see the force of the reasoning which would infer that because parties usually make their contract in one way it would be void when they choose to make it in another, equally good at common law and not prohibited by any statute.' See, also, *Relief Ins. Co. v. Shaw*, 94 U. S. 574. A usage that an oral contract if made is considered invalid would be plainly repugnant to law and void. In the present case the evidence of usage was offered, not in aid of the construction of



case the plaintiff made an application for fire insurance to defendant's local agent, who orally agreed to place a certain amount at a certain rate upon the risk at once, and to bind it, and immediately made a memorandum to that effect in the "binding book." The risk was specially hazardous, and in view thereof a special agent was to inspect and approve the risk. The agent had written authority to receive proposals for insurance, and was accustomed to fill and deliver policies signed in blank by the company's officers and left with him for that purpose. The same class of risks had been frequently taken by the agent, and he had issued policies thereon without consulting the company. Upon action brought it was decided that the agent had made an oral agreement for insurance within the apparent scope of his authority.<sup>5</sup> So an oral agreement may be binding on the company when by agreement with the assured the agent is to fix the amount of indemnity as he sees proper and does fix it, as shown by memorandum made by him.<sup>6</sup> In England, however, the act 35 George III., chapter 63, section 2, expressly provides for an engrossed printed or written contract in case of every agreement for any marine in-

a contract, but to support the position that no contract whatever had been made. If a contract had in point of fact been made as alleged, it was of no consequence whether it was according to general usage or not. . . . It is no legitimate confirmation of the defendant's position under such circumstances to show that other insurance companies usually require applications for marine insurance to be in writing as a condition of making the contract. . . . An oral contract was lawful, and the evidence was properly confined to the question whether this particular oral contract had been made, as testified by the plaintiff, without going into the general inquiry whether other parties were accustomed to make such contracts.' "

<sup>5</sup> Putnam v. Home Ins. Co., 123 Mass. 324; 25 Am. Rep. 93. But see Daniels v. Citizens' Ins. Co., 5 Fed. Rep. 425, 430; Taylor v. Germania Ins. Co., 2 Dill. (C. C.) 282; Franklin F. Ins. Co. v. Taylor, 52 Miss. 44; Home Ins. Co. v. Adler, 71 Ala. 516; Ruggles v. American Cent. Ins. Co., 114 N. Y. 415; 11 Am. St. Rep. 674, and note, 678, and note; 21 Am. St. Rep. 883. Cases of parol agreements to insure held valid are: Mobile etc. Ins. Co. v. McMullan, 31 Ala. 711; Van Loan v. Farmers' Mut. F. Ins. Assn., 90 N. Y. 280; Commercial Mut. M. Ins. Co., 19 How. (U. S.) 318; 2 Curt. (C. C.) 524; Fish v. Liverpool etc. Ins. Co., 44 N. Y. 538; Angell v. Hartford F. Ins. Co., 59 N. Y. 171; 17 Am. Rep. 322.

<sup>6</sup> Croft v. Hanover F. Ins. Co. (W. Va., 1895), 21 S. E. Rep. 854.

surance, and that the same shall specify the premium or consideration, the character of the risk, the sums insured, and the names of the insurers.<sup>7</sup> And by act 1867, 30 Victoria, chapter 23, section 7, every contract or agreement for sea insurance<sup>8</sup> must be expressed in a policy, otherwise it is null and void, and in addition, under section 9 of said act, no policy shall be pleaded or given in evidence, or admitted in any court to be good and available in law or in equity, unless duly stamped.<sup>9</sup> Under the same act policies effected abroad and chargeable with duty by virtue of the 28 and 29 Victoria, chapter 96, section 15, may be stamped within the time specified in that act. Again, under an English decision, it is held that although there is no positive law in New South Wales necessitating that marine contracts of insurance be in writing, yet an agent authorized to make contracts in the ordinary way must make them in writing,<sup>10</sup> and although the slip be initialed, and would otherwise be a contract of marine insurance, it is not an enforceable policy in England under the provisions of the act above noted.<sup>11</sup>

§ 32. **Same—The Common Law Rule.**—Formerly, contracts of insurance were not required to be in writing, and this was the common law in England.<sup>12</sup> The earliest English statute, 43 Elizabeth, chapter 12, enacted in 1601, mentions policies of insurance, as does also the statute 6 George I., chapter 18, which was the act securing to the two great companies of

<sup>7</sup> See, also, 25 Geo. III., c. 44; 28 Geo. III., c. 56, which imply a written contract; Abbott on Shipping, Story's ed., 2, n. 1.

<sup>8</sup> Other than that referred to in Merchant Shipping Amd. Act, 1862, 25 & 26 Vict., c. 63, sec. 55.

<sup>9</sup> But see *In re Teigenmuth Mut. Ship. Assn. (Martin's Claim)*, L. R. 14 Eq. 148.

<sup>10</sup> *Davies v. National F. & M. Ins. Co. of N. Z.*, App. Cas. L. R. (H. L. P. C., Eng. 1891) 485.

<sup>11</sup> *Fisher v. Liverpool M. Ins. Co.*, L. R. 8 Q. B. 469; L. R. 9 Q. B. 418. As to shipmen's clubs or associations, see 30 & 31 Vict., c. 23, sec. 9; 25 & 26 Vict., c. 89, secs. 3, 6, 180, 193, 194, 196, 206.

<sup>12</sup> *The Northwestern Iron Co. v. Aetna Ins. Co.*, 23 Wis. 160; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 448; 77 Am. Dec. 419; *First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; 1 Smith's Mercantile Law (M. & H. 1890), 494.

assurance in 1719 the monopoly of making these contracts, subject to certain exceptions. In this latter act the preamble declares that this contract "or course of dealing is commonly called a policy of assurance." But there is nothing in these statutory regulations which can be construed as making the acts requiring a written policy in England declaratory of the common law, and in fact the earlier statutes in that country sought only to remedy or restrain certain abuses in insurance rather than to declare old principles. It was no doubt a well-established usage to have policies of assurance in England from the day of the Lombards, and Maynes<sup>13</sup> asserts that it was customary to register verbatim policies of assurance in the office of assurances in order to preserve evidence of the contract in case the policy should become lost. But these and other like facts go no farther than to establish a usage to have policies as an evidence of the contract. An examination of Lord Mansfield's decisions and of the cases subsequent thereto fails to discover that a policy or writing was necessary to the validity of a contract of insurance at the common law, and it is admitted that formerly the contract was not required to be in writing.<sup>14</sup> Emerigon declares that "Valin and Pothier agree in saying that in insurance the writing is only required for proof of the contract; that the writing is extrinsic to the substance of the agreements. They are reduced to writing for the purpose of more easily preserving their proof. . . . But this common-law rule ceases its operation in all cases where writing is expressly required by law. . . . The Guidon<sup>15</sup> informs us that formerly insurances were made without writing; they were termed 'in confidence,' because the person stipulating for insurance did not make his bargain in writing, but trusted to the good faith and honesty of his insurer. But this practice, because of the abuses and disputes it engendered, was subsequently prohibited in all com-

<sup>13</sup> *Lex Mercatoria*, 115.

<sup>14</sup> See 1 Wood on Fire Insurance, 2d ed., sec. 1; 1 Phillips on Insurance, 3d ed., secs. 8, 9.

<sup>15</sup> Chapter 1, art. 2, p. 223.

mercial places.”<sup>16</sup> And the court in *Sandford v. Trust Fire Insurance Company*<sup>17</sup> declared in 1845 that it had not been able to find anything in the common law of England rendering it necessary that contracts of insurance should be in writing. So it was held in a case in the United States Supreme Court<sup>18</sup> that under the common law a promise for a valuable consideration to make a policy of insurance is no more required to be in writing than a promise to execute and deliver a bond or a bill of exchange or a negotiable note. In the case of *Cockerell v. Cincinnati Mutual Insurance Company*<sup>19</sup> the court, relying upon usage and upon the fact that the charter of the company required a writing, holds that such a thing as a verbal policy was unknown to the law of insurance, and that a policy must be in writing “as supported and declared by universal adjudication.” But the policy is the writing. This case was substantially overruled by a later Ohio case; that is, in so far as relates to the contract being in writing.<sup>20</sup> The opinions of Mr. Duer and Mr. Millar<sup>21</sup> are to the same purport as the Ohio case. The court of appeals in New York<sup>22</sup> has held that a contract of insurance is not required to be in writing by the general principles of law. Referring again to the statutory regulations in England, Mr. May<sup>23</sup> doubts whether the stamp laws require a writing and whether a parol agreement to insure would be void. The statements in this section as to the common-law rule relate also to cases of contracts by other than corporations. The rule as to them will be considered hereafter.<sup>24</sup>

§ 33. Same—Statutory Regulations—English Stamp Acts. —Where a statute requires the stipulations to be in

<sup>16</sup> *Emerigon on Insurance*, Meredith's ed. 1850, c. ii, sec. 1, pp. 25, 26. See 1 *Wood on Fire Insurance*, 2d ed., p. 2, sec. 1.

<sup>17</sup> 11 *Paige* (Mass.), 547.

<sup>18</sup> *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 313, 321, 322.

<sup>19</sup> 16 Ohio, 148. See, also, *Bell v. Western etc. Ins. Co.*, 5 Rob. (La.) 423; 39 Am. Dec. 542.

<sup>20</sup> *Dayton Insurance Co. v. Kelly*, 24 Ohio St. 345; 15 Am. Rep. 612.

<sup>21</sup> 1 *Duer on Insurance*, ed. 1845, 60; *Millar on Insurance*, 30.

<sup>22</sup> *First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305.

<sup>23</sup> 1 *May on Insurance*, 3d ed., sec. 25.

<sup>24</sup> See secs. 36, 37, herein.

writing, it is indispensable that they should be.<sup>25</sup> Thus it was held in Georgia,<sup>26</sup> where the code requires a writing, that an insurance company was not estopped from insisting that the contract was not in writing in a case where the insured, while removing his insured stock of goods to another house, requested the insurance agent to transfer his policy if necessary, and the agent consented to the removal and promised to make the necessary entry on the books, and that equity would not relieve the party acting on a parol contract unless his act was in pursuance of the contract, on the faith of it, and induced by it.<sup>27</sup> It was said by the court in a Kansas case that subsequent to the passage of the revenue laws requiring a stamp it might be necessary that a contract of insurance should be in writing.<sup>28</sup> But in *Fish v. Cottenet*<sup>29</sup> it is held that a stamp does not affect the validity of a parol contract for insurance. In that case the court says: "Contracts of this character when put in writing certainly require a stamp. If the defendant had performed its agreement and issued a policy the government would have received the aid to its revenue which is so much required. It is not the making of the agreement that defrauds the revenue, but its breach by the defendant. Agreements, when in writing, must be stamped. A stamp upon an oral agreement is an impossibility." And Mr. May<sup>30</sup> asserts that the stamp laws do not go to the validity of the contract. He also says that the doctrine of the Kansas case above referred to "seems not to be well founded," and "that the state courts do not recognize the constitutional right of the general government to determine the rules of evidence by which the former shall be governed, and hold pretty uniformly" that the laws of Congress in regard to using or admitting in evidence only stamped instruments applies only to United States courts,<sup>31</sup> and that author doubts the power of Congress to de-

<sup>25</sup> *Clark v. Brand*, 62 Ga. 23 (under Ga. Code, sec. 2794).

<sup>26</sup> *Simonton v. Liverpool etc. Ins. Co.*, 51 Ga. 76.

<sup>27</sup> See *Southern L. Ins. Co. v. Kempton*, 56 Ga. 339.

<sup>28</sup> *West Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347.

<sup>29</sup> 44 N. Y. 538, 543.

<sup>30</sup> 1 *May on Insurance*, 3d ed., sec. 25.

<sup>31</sup> Citing *Carpenter v. Snelling*, 97 Mass. 452; *Hitchcock v. Sawyer*,

clare unstamped instruments wholly void, and cites cases from Illinois and Kentucky holding that it has not such power.<sup>32</sup> And he adds: "But it is doubtful if this will become the settled view of the law upon mature consideration."<sup>33</sup> It is also very generally held that under United States Statutes 1864, chapter 173, section 163, and 1865, chapter 78, only those unstamped instruments can be said to be void where the stamp has been omitted with intent to defraud the revenue, and such is the law under the statute of 1866, chapter 184, section 9."<sup>34</sup> Mr. Cooley says: "It has been repeatedly decided that the act of Congress which provided that certain papers not stamped should not be received in evidence must be limited in its operation to the federal courts."<sup>35</sup> Several of these cases have gone still further and declared that Congress cannot preclude parties

39 Vt. 412; *Dudley v. Wells*, 45 Me. 145; *McGovern v. Hoesback*, 53 Pa. St. 176, 177; *Griffin v. Ranney*, 35 Conn. 239; *Craig v. Dimock*, 47 Ill. 308; *Bunker v. Green*, 48 Ill. 243; *United States Express Co. v. Haines*, 48 Ill. 248; *Twitchell v. Commonwealth*, 7 Wall. (U. S.) 321; *Green v. Holway*, 101 Mass. 243; 3 Am. Rep. 339. Contra, *Chartiers & Rob. Turnp. Co. v. McNamara*, 72 Pa. St. 228; 13 Am. Rep. 673; cases, in 7 Alb. L. J. 49; *Edeck v. Ranier*, 2 Johns. (N. Y.) 423; *Plessinger v. Depuy*, 25 Md. 419. "Where unstamped instruments were excluded the question of constitutional competency was not raised."

<sup>32</sup> Citing *Latham v. Smith*, 45 Ill. 29; *Hunter v. Cobb*, 1 Bush, 239.

<sup>33</sup> Citing License Tax cases, 5 Wall. 462; *Pervear v. Commonwealth*, 5 Wall. 475.

<sup>34</sup> Citing numerous cases. Examine *Hunter v. Cobb*, 1 Bush (Ky.), 239; *Sayles v. Davis*, 22 Wis. 225; *Green v. Lowry*, 38 Ga. 548; *Jacquin v. Warren*, 40 Ill. 459; *Israel v. Redding*, 40 Ill. 362; *Blunt v. Bates*, 40 Ala. 470; *McLean v. Skelton*, 18 La. Ann. 514; *Blake v. Hall*, 19 La. Ann. 49; *Carpenter v. Snelling*, 97 Mass. 452; *Maynard v. Johnson*, 2 Nev. 16. If one fails to affix the stamp, the presumption arises that such act is willful: *Howe v. Carpenter*, 53 Barb. (N. Y.) 382. Contra, *New Haven etc. Co. v. Quintard*, 6 Abb. Pr., N. S. (N. Y.), 128; *Welterner v. Riggs*, 3 W. Va. 445; Act June 30, 1864, which only declared those instruments invalid where there was an intent to evade the provisions of the act: *Hallock v. Jaudin*, 34 Cal. 167, declares internal revenue stamps no part of a note. Instrument not stamped when made may be stamped subsequently, so as to be admissible in evidence, as where stamped in presence of the court: *Petersen v. Eames*, 54 Me. 203; *Cooke v. England*, 27 Md. 14; *Dorris v. Grace*, 24 Ark. 326. See further as to stamps, *Hitchcock v. Sawyer*, 39 Vt. 412; *Corbin v. Tracy*, 34 Conn. 325.

<sup>35</sup> Citing numerous cases.  
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from entering into contracts permitted by the state laws, and that to declare them void was not the proper penalty for the enforcement of tax laws." <sup>36</sup> And in a case which arose in Massachusetts the court said: "We entertain grave doubts whether it is within the constitutional authority of Congress to enact rules regulating the competency of evidence on the trial of cases in the courts of the several states which shall be obligatory upon them. We are not aware that the existence of such a power has been judicially sanctioned. There are numerous weighty reasons against its existence." <sup>37</sup> In England, however, the statute 35, George III., chapter 63, which repealed all former stamp duties on marine insurances, and which did not extend to fire or life insurances, provided that every contract for marine insurance should be "printed or written," and that an insurance contract or agreement therefore should be void unless stamped, and prescribed a penalty for noncompliance. <sup>38</sup> As we have stated under a prior section, <sup>39</sup> the English Act of 1867, 30 Victoria, chapter 23, page 9, requires that every policy of sea insurance be duly stamped to be admissible in evidence, and also provides that policies made abroad may be stamped. Other sections of this act make provisions in relation to the stamping of policies, covering time and voyage policies, mixed policies, and insurances by carriers, and making certain exceptions in case of mutual insurances, and providing penalties for noncompliance. <sup>40</sup> Under a decision rendered in 1891 the words "ship or vessel," in the Customs and Inland Revenue Act of 1870 (which imposes a stamp duty upon policies of sea insurance made on any ship or vessel), will be construed "ships or vessels." Under the Interpretation of Statutes Act of 1889,

<sup>36</sup> Cooley's Constitutional Limitations, 6th ed., 592, n. 2, citing several cases.

<sup>37</sup> *Green v. Holway*, 101 Mass. 243; 3 Am. Rep. 339.

<sup>38</sup> See *Kensington v. Inglis*, 8 East, 273; *Morgan v. Mather*, 2 Ves. Jr. 18; *Rogers v. McCarthy*, 3 Esp. 106; 3 Phillips on Evidence, 5th ed., 232.

<sup>39</sup> Sec. 31, herein.

<sup>40</sup> See, also, 33 & 34 Vict., c. 97, sec. 117; 44 & 45 Vict., c. 12, sec. 44; 47 & 48 Vict., c. 62, sec. 8. See, also, list of acts in force in England in 1889 noted, sec. IV., preliminary chapter herein. 39 & 40 Vict., c. 6, sec. 2, provides for stamping after execution.

providing that in statutes enacted after 1850 words in the singular shall include the plural, so that where one hundred and nineteen vessels were insured under a time policy, it was held that the stamp duty must be calculated upon the aggregate amount insured, even though a specific sum was appropriated to each vessel.<sup>41</sup> In many of the states a standard form of fire policy is provided for by statute.<sup>42</sup>

§ 34. Parol Contracts—Mutual Benefit Societies.—Some doubt has been expressed as to whether the rule that a contract of insurance need not be in writing except when required by statute applies to mutual benefit societies.<sup>43</sup> The cases for the most part are those of marine and fire insurances, with some authorities in accident and life insurance on other than the mutual plan.<sup>44</sup> But we see no reason why the rule should not obtain in cases of an agreement for insurance on the mutual plan as in other contracts, and it has been held in New York that a mutual fire insurance company could bind itself by parol to issue a valid policy of insurance. The court said, referring to the plaintiff, that "it must be assumed that she knew the character of defendant and the purpose for which it

<sup>41</sup> *Great Britain Steamship Prem. Assn. v. White* (Scot. Ch. Sess. 1891), 29 Scot. L. R. 104.

<sup>42</sup> Acts Mass. 1887, c. 214, sec. 60; Howell's Annot. Stat. Mich. 1882, secs. 4344-53; Minn. Stat. 1891, vol. 1, secs. 2973-77; Gen. Laws 1889, c. 217; N. H. Laws 1885, c. 93, sec. 3; N. J. Laws 1892, c. 231; N. Y., 3 Rev. Stats. (B'k's Bros. 8th ed.), p. 1663; Laws 1886, c. 488; N. Dak. Laws 1890, p. 253, c. 74; Wis. Laws 1891, vol. 1, c. 195. As to unconstitutionality of act of standard fire policy, see *O'Neil v. American F. Ins. Co.*, 166 Pa. St. 72; reversing 3 D. R. 778 (act April 1891, Pub. L. 22, sec. 1).

<sup>43</sup> Bacon's Benefit Societies and Life Insurance, ed. 1886, sec. 172; 1 *Id.*, new ed. 1894, sec. 172.

<sup>44</sup> Marine: *Northwestern Ins. Co. v. Aetna Ins. Co.*, 23 Wis. 160; 96 Am. Dec. 145. Fire: *Strohn v. Hartford F. Ins. Co.*, 33 Wis. 649; 37 Wis. 625; 19 Am. Rep. 777; *First Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y. 305. Life: *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 219; 65 Am. Dec. 565. Accident: *Rhodes v. Ry. Pass. Ins. Co.*, 5 Lans. 71. Same to ship goods on deck instead of hold: *N. W. Ins. Co. v. Aetna Ins. Co.*, 23 Wis. 78. As to mutual companies: *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318; *Belleville Mut. Co. v. Van Winkle*, 12 N. J. L. 333; *Schaffer v. Mut. Fire Ins. Co.*, 89 Pa. St. 296.



was organized, and her application for insurance was an application to become a member of the defendant upon the terms and conditions prescribed in its charter, and its constitution and by-laws. She must have expected a policy in the usual form issued by the defendant, and must be deemed to have agreed to accept such a policy. She must also be deemed to have agreed in advance to pay the consideration in the mode prescribed by the defendant's charter, constitution, and by-laws. The agreement for this insurance was binding, therefore, not only on defendant, but also upon the plaintiff. Defendant could have issued and tendered its policy to the plaintiff."<sup>45</sup> So an oral promise by the president of an insurance company to make a policy of insurance is a contract binding on the company, and a court of equity will compel its specific performance.<sup>46</sup> It is true that mutual benefit societies differ in some respects from other mutual insurance corporations, and the powers of such organizations are restricted either by statute or by charter,<sup>47</sup> and these restrictions relate not only to membership, but to the designation of beneficiaries. The laws, however, of these societies have been construed liberally in many cases,<sup>48</sup> although some courts are inclined to limit such corporations strictly to their statutory or charter powers;<sup>49</sup> but the omission to sign or countersign a policy has been held not to

<sup>45</sup> *Van Loan v. Farmers' Mut. F. Ins. Assn.*, 90 N. Y. 280.

<sup>46</sup> *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318; see, also, *Union etc. Ins. Co. v. Commercial etc. Ins. Co.*, 2 Curt. (C. C.) 524; *New England etc. Ins. Co. v. Robinson*, 25 Ind. 536; *First Baptist Church v. Brooklyn Ins. Co.*, 18 Barb. (N. Y.) 69; *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. (N. Y.) 82.

<sup>47</sup> *Elsey v. Odd Fellows' etc. Assn.*, 142 Mass. 224; *Kentucky Masonic etc. Ins. Co. v. Miller*, 13 Bush (Ky.), 489.

<sup>48</sup> *Supreme Lodge K. of P. v. Schmidt*, 98 Ind. 374, 381; *Bloomington Mut. L. Ben. Assn. v. Blue*, 120 Ill. 121; 11 N. E. 331; 8 West. Rep. 642; 60 Am. Rep. 558; *Maneely v. Knights of B.* (Pa.), 7 Cent. Rep. 633; 9 Atl. Rep. 41; *Covenant Mut. B. Assn. v. Sears*, 114 Ill. 108.

<sup>49</sup> *Kentucky Mas. Mut. Ins. Co. v. Miller*, 13 Bush (Ky.), 489; *Knights of H. v. Nairn*, 60 Mich. 44; 26 N. W. Rep. 826; *Daniels v. Pratt*, 143 Mass. 216; 10 N. E. Rep. 166; 3 N. Eng. 480; *State v. Moore*, 38 Ohio St. 7; *National Mut. Aid Assn. v. Gouser*, 43 Ohio St. 1; 1 West Rep. 4; 1 N. E. Rep. 11; *Elsey v. Odd Fellows' etc.*, 142 Mass. 224; 2 N. Eng. 667; 7 N. E. Rep. 844; *Van Bibber v. Van Bibber*, 82 Ky. 347; *Worley v. Northwest Mas. Aid Assn.*, 10 Fed. Rep. 227.

render a policy invalid, notwithstanding such requirement of the corporation.<sup>50</sup> So it is held that a regulation or by-law of a fire insurance company cannot make void a policy issued by the directors in contravention thereof if the policy is not voidable upon other grounds,<sup>51</sup> and, as a general rule, the doctrine of waiver is applicable equally to mutual benefit societies as to other insurance companies where the charter or constitution of a society does not render it inapplicable,<sup>52</sup> for in general by-laws may be waived which are intended as a protection to the company.<sup>53</sup> Again, where a mutual benefit society issues a policy which is in its terms in conflict with the by-laws of the society, the presumption is that the society has waived its by-laws in favor of assured,<sup>54</sup> and a by-law restricting membership in a certain class to persons under a certain age may be waived.<sup>55</sup> And where an agent has acted within the apparent scope of his authority, the principal is estopped to allege specific instructions not known to the party,<sup>56</sup> or to deny the

<sup>50</sup> *Myers v. Keystone etc. Ins. Co.*, 27 Pa. St. 268; 67 Am. Dec. 462; *Union Ins. Co. v. Smart*, 60 N. H. 458.

<sup>51</sup> *Campbell v. Merchants' etc. Ins. Co.*, 37 N. H. 35; 72 Am. Dec. 324; *Merchants' etc. Ins. Co. v. Curran*, 45 Mo. 142; 100 Am. Dec. 361.

<sup>52</sup> *Millard v. Supreme Council etc.*, 81 Cal. 340; 22 Pac. Rep. 864. In this case the society had continued to levy and receive assessments from the member after the date when it claimed the member ceased to be in good standing.

<sup>53</sup> *Union etc. Ins. Co. v. Keyser*, 32 N. H. 313; 64 Am. Dec. 375. Here, by the charter and by-laws, the directors were required to divide the risks into four classes, and to determine the rates of insurance and the issuing of all policies; with full knowledge of all facts the directors insured property which should have been insured as belonging to another class.

<sup>54</sup> *Davidson v. Old People's M. B. Soc.*, 39 Minn. 303; 39 N. W. Rep. 803.

<sup>55</sup> *Morrison v. Wisconsin O. F. M. L. Ins. Co.*, 59 Wis. 162.

<sup>56</sup> *Emery v. Boston M. Ins. Co.*, 138 Mass. 398, 412. In this case under the by-laws the president was required to sign all policies. In case, however, of his absence, inability, or death, policies were to be signed by two directors. The secretary of the company contracted orally with the plaintiff to insure him. The company claimed a want of authority, but it was held that the evidence showed a sufficient binding authority: *New England etc. Ins. Co. v. Schettler*, 38 Ill. 166; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222. Here the court said: "The powers of the agent are prima facie coextensive with the business

agent's power or its own power to contract where the contract has been executed by the other party,<sup>57</sup> and an unrestricted authority to an agent of a fire insurance company to negotiate a contract of insurance by issuing a policy includes authority to make a valid preliminary contract for such issue; and a parol agreement to that effect upon his part and the receipt of the premium therefor binds the company.<sup>58</sup> In view, therefore, of these principles why cannot a corporation of this character bind itself by a completed agreement of insurance not in writing? Certainly in those cases where the society is one which does not issue certificates<sup>59</sup> it could not be urged that the contract must be in writing. And assume the case where an agent, within the apparent scope of his authority, makes an oral agreement of insurance in a corporation which does issue certificates, and such party is received into the corporation, and the right to certain benefits matures before any certificate is issued, can the corporation impeach its own want of power to make such contract where not contrary to public policy? To hold that it could would hardly seem to be founded in the reason and justice of the law.<sup>60</sup> Public policy is the basis of the

intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals."

<sup>57</sup> *Bloomington etc. Assn. v. Blue*, 120 Ill. 127; 58 Am. Rep. 852; 60 Am. Rep. 558; *Fuller v. Boston etc. Ins. Co.*, 4 Met. (Mass.) 206; *Lamont v. Grand Lodge etc.*, 31 Fed. Rep. 177.

<sup>58</sup> *Ellis v. Albany Ins. Co.*, 50 N. Y. 402. The agent was authorized to receive proposals for insurance, and to make and countersign policies and to renew the same.

<sup>59</sup> *Grand Lodge v. Elsner*, 26 Mo. App. 108.

<sup>60</sup> See *Bloomington Mut. B. Assn. v. Blue*, 120 Ill. 127; 58 Am. Rep. 852; 60 Am. Rep. 558; *Chicago Building Soc. v. Crowell*, 65 Ill. 454. In this case Crowell borrowed money of the society, and the latter procured insurance upon the property, and shortly before the expiration of the policy Crowell told the secretary that he wished to insure his own property; but the secretary replied that the society preferred to procure the insurance and would do so, but before the insurance was effected the property was destroyed. It was held that though the procuring of insurance was not an express right conferred by charter, yet as the society had exercised these powers they would be estopped from claiming it as ultra vires: *Germantown Ins. Co. v. Dhein*, 43 Wis. 420; *Gordon v. Sea F. Assur. Co.*, 1 Hurl. & N. 599; *Connecticut Mut. L. Ins. Co. v. Cleveland etc. Co.*, 41 Barb. (N.Y.) 9; *In re County L. Assur. Co.*, L. R. 5 Ch. 288; *Bennett v. Maryland F. Ins. Co.*, 14 Blatchf. (C.C.) 422; *In-*

prohibition by law of acts which are unauthorized by the charter of a company,<sup>61</sup> but there are numerous cases which uphold contracts, even when made in violation of a provision contained in the charter, and which involve an unauthorized exercise of corporate powers. Especially is this true where it appears that the provision so contravened was not intended by the legislature to operate as an imperative prohibition of the contract violating such charter provision; or where the charter provision was intended for the benefit of the corporation rather than the protection of the public; or where the provision is merely directory;<sup>62</sup> or where the contract is made in violation of the charter, and third persons acting in good faith and without notice would be injured thereby.<sup>63</sup> Such cases also involve questions as to the nature and extent of the powers of agents, and also whether the party dealing with the agent had notice of facts which if known to him would make the contract not only ultra vires, but void. The point under consideration also comprehends the question of estoppel, as where the party has relied upon the apparent authority of an agent, or the company has received the benefits arising from unauthorized acts. While there are certain leading principles which aid in a solution of the question of what is and is not a valid contract within the charter or articles of association, yet each case must rest in a large measure upon its particular facts. Many of the decisions are arbitrary and seemingly rendered without regard to

*Insurance Co. v. McCain*, 96 U. S. 84; *In re Port of London Assur. Co.*, 5 De Gex, M. & G. 465, 481; *Southern L. Ins. Co. v. Lanier*, 5 Fla. 110; 58 Am. Dec. 448; *Bulkley v. Derby Fish. Co.*, 2 Conn. 252, 254; 7 Am. Dec. 271; *New England etc. Ins. Co. v. Schettler*, 38 Ill. 166; *Matt v. Roman Catholic Mut. Prot. Soc.*, 70 Iowa, 455; 30 N. W. Rep. 799; *Emery v. Boston M. Ins. Co.*, 138 Mass. 410; *Lamont v. Hotelmen's B. Assn.*, 30 Fed. Rep. 817.

<sup>61</sup> Morawetz on Private Corporations, ed. 1882, sec. 100.

<sup>62</sup> *National Bank v. Matthews*, 98 U. S. 627; *Ayres v. South Australian Banking Co.*, L. R. 3 P. C. 548; *Bates v. Bank etc.*, 2 Ala. 462; *Gold Min. Co. v. National Bank*, 96 U. S. 640; *Palmer v. Cypress Hill Cemetery*, 122 N. Y. 429; *Buckley v. Derby F. Co.*, 2 Conn. 252; 7 Am. Dec. 271; *Leslie v. Lorillard*, 110 N. Y. 519; *Zabriskie v. Cincinnati etc. R. R. Co.*, 23 How. (U. S.) 381. See notes 22 Am. St. Rep. 768; article "Ultra Vires Contracts of Corporations," 32 Am. Law. Reg. 43.

<sup>63</sup> Morawetz on Private Corporations, ed. 1882, sec. 50; *Id.*, rule vi, sec. 62, et seq. See next section herein.

principle or authority.<sup>64</sup> It will be seen, therefore, that the decided cases offer herein no certain and unvarying rule for the determination of the proposition before us. It is held that when an accepted applicant for membership pays his membership fee and promises in his written application to pay the further sum of one dollar and ten cents whenever any other member dies, or to forfeit his own claim to a benefit, and the by-laws provide that the association within thirty days after satisfactory proof of his death, will pay to his "widow" as many dollars not exceeding one thousand as there are surviving members at the time of the death, a contract of life insurance is completed.<sup>65</sup> So where the intestate has complied with all other provisions of the society, the fact that he had not taken out a certificate nor designated to whom his benefit should be payable does not preclude a recovery against the society, but in the absence of such certificate the family of the deceased will be entitled to the benefit,<sup>66</sup> and where the supreme lodge of the Knights of Honor sends a benefit certificate, properly signed and sealed, to a subordinate lodge for a person who has applied for membership, been balloted for, elected, and had a degree conferred upon him, and has paid his fees and passed a medical examination which has been approved, the contract relations between him and the supreme lodge are complete, although the subordinate lodge has not delivered to him the certificate;<sup>67</sup> and in *Zell v. Herman Farmers' Insurance Company*<sup>68</sup> it was held that under its by-laws the company could bind itself by a contract of insurance without issuing a written policy.<sup>68a</sup>

<sup>64</sup> See notes 51 Am. Dec. 341-45; 13 Am. Dec. 108, 109; Morawetz on Corporations, ed. 1882, secs. 28-148, 165, 209; Angell & Ames on Corporations, 9th ed., secs. 256-65. See next section herein.

<sup>65</sup> *Bolton v. Bolton*, 73 Me. 299.

<sup>66</sup> *Bishop v. Grand Lodge etc.*, 112 N. Y. 627; 20 N. E. Rep. 562.

<sup>67</sup> *Lorcher v. Supreme Lodge K. of H.*, 72 Mich. 316; 40 N. W. Rep. 545.

<sup>68</sup> 75 Wis. 521; 44 N. W. Rep. 828.

<sup>68a</sup> For a full consideration of the principles discussed in this section, see 4 Thompson on Corporations, ed. 1894, sec. 5015, et seq., 5825, et seq.; vol. 5 Id., secs. 5849, 6042.

§ 35. **Parol Contract — Corporations — Statutory or Charter Provisions.**—Some distinction was formerly made between corporations and individuals or partnerships as to the validity of parol contracts, since under the common law corporations could only contract under their corporate seal. But this doctrine does not now obtain.<sup>69</sup> There are cases, however, which go so far as to hold that where the act of incorporation or charter of the insurer requires the contract to be in writing, such corporate provision should govern, and necessitates a writing. Such decisions would seem to rest upon the principle that a corporation can only act in the manner and mode prescribed by the law creating it. Thus, in 1804, Mr. Chief Justice Marshall, although not holding that a parol contract of insurance was invalid, determines that where the act incorporating an insurance company provides that its policies shall be in writing, a contract to cancel is as solemn an act as the contract for insurance, and must likewise be in writing and not rest in parol.<sup>70</sup> So in *Spitzer v. St. Mark's Insurance Company*<sup>71</sup> it is held that since under the company's act of incorporation it was empowered only to make policies in writing, a contract to renew a policy was the same as to make one, and it could only be done by a written instrument, and where the company's charter provided that policies issued by the company should be under seal, it was decided that an unsealed policy could not be given in evidence.<sup>72</sup> Again, it was declared in Illinois that the rights of the parties were governed by the

<sup>69</sup> *Thayer v. Middlesex Ins. Co.*, 10 Pick. (Mass.) 326, 329; *N. E. etc. Ins. Co. v. Schettler*, 38 Ill. 171; *Hamilton v. Lyeoming Mut. Ins. Co.*, 4 Pa. St. 339; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Bank of Columbia v. Patterson*, 7 Cranch (U. S.), 299; *Fleckner v. United States Bank*, 8 Wheat. (U. S.) 357, 358, per Story, J.; *Angell & Ames on Corporations*, 9th ed., sec. 228, et seq.; 1 *May on Insurance*, Parsons' ed., sec. 16; *Morawetz on Private Corporations*, ed. 1882, sec. 167, et seq. See, as to parol contracts by corporations, 4 *Thompson on Corporations*, ed. 1894, secs. 5015, et seq., 5174-5177, 5825, et seq.

<sup>70</sup> *Head v. Providence Ins. Co.*, 2 Cranch (U. S.), 150.

<sup>71</sup> 6 Duer (N. Y.), 6 (1856).

<sup>72</sup> *Lindauer v. Delaware Mut. S. Ins. Co.*, 13 Ark. 461. See *Insurance Co. v. McGilliway*, 9 L. C. 488; *National Banking etc. v. Knaup*, 55 Mo. 154; *Cockerill v. Cincinnati Ins. Co.*, 16 Ohio, 148. But see the last section herein.

law of that state where the application was made to a local agent in the state, and the policy issued in New York did not become operative until countersigned by the local agent there.<sup>73</sup> So in Massachusetts it is held that under the statute insurance companies can make valid policies only when attested by the signatures of the president and secretary; but the court held that this had no application to oral agreements to make insurance.<sup>74</sup> There is a distinction, however, between mere agreements to issue a policy and completed parol contract of insurance. There are numerous cases which hold that preliminary parol contracts to issue a policy are valid, even though a loss occur before the issuance, and even though the charter or act of incorporation provide that the contract be executed only in a certain manner.<sup>75</sup> But where the question is whether a parol executed contract of insurance can be enforced in view of such charter provisions as the above, many serious considerations are involved, such as the right of a corporation to incur a liability which is not necessarily an enlargement of its powers. So again, it cannot be assumed that every person is familiar with the charters of all corporations,<sup>76</sup> and where a person without such knowledge has acted in the highest good faith in pursuance of a parol contract and induced by it, it is undoubtedly true that the corporation could not plead *ultra vires* to avoid the obligation.<sup>77</sup> So where a contract has been fully per-

<sup>73</sup> *Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 398.

<sup>74</sup> *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. (C. C.) 318.

<sup>75</sup> See *Constant v. Insurance Co.*, 3 Wall. Jr. (U. S.), 313; *Collett v. Morrison*, 9 Hare, 162; *Perry v. Mercantile Ins. Co.*, 8 U. C. 363.

<sup>76</sup> *Lloyd v. West Branch Bank*, 15 Pa. St. 172.

<sup>77</sup> See *Parish v. Wheeler*, 22 N. Y. 494; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549; 35 N. E. Rep. 1060; *Louisville etc. Ry. Co. v. Flannigan (Ind.)*, 14 N. E. Rep. 370; *National Bank v. Whitney* 103 U. S. 99; *Credit Co. v. Howe Mach. Co.*, 54 Conn. 387; *Lloyd v. West Branch Bank*, 15 Pa. St. 172; *Union Nat. Bank v. Matthews*, 98 U. S. 621; *Mallory v. Hanauer Oil Works*, 86 Tenn. 598; 8 S. W. Rep. 396; *Norton v. Bank*, 61 N. H. 593; *Palmer v. Hartford F. Ins. Co.*, 54 Conn. 488; *Samuel v. Fidelity etc. Co.*, 1 N. Y. S. 850; 2 *Morawetz on Corporations*, 2d ed., c. viii, secs. 577-725; 5 *Thompson on Corporations*, ed. 1894: Sec. 6021, "The other party estopped when he has received the benefit"; Sec. 6022, "Or where the corporation has acted to its disadvantage"; Sec. 6023, "Rule where the contract is fully ex-

formed by the party contracting with a corporation, and the corporation has received the benefits from such contract, it cannot afterward invoke the doctrine of *ultra vires* to defeat an action brought against it on such contract. And where an insurance company issues a policy to one upon his own life, payable at his death to a third person, and the insured pays the premiums which are accepted by the company, it is held that it cannot, after the death of the assured, resist payment of the policy to the beneficiary, upon the ground that he is neither a relative, heir, nor devisee of the insured, and that its charter authorizes it to pay to such persons only.<sup>78</sup> So if a company by its charter is prohibited from insuring more than two-thirds of the value of any property, yet voluntarily and without fraud or misrepresentation insures more, the policy is not thereby made void.<sup>79</sup> Again, when the act of incorporation provides that all powers relating to contracts of insurance are vested in directors, and they are to divide the property insured into four classes and to direct the making and issuing of all policies of insurance, if after making a by-law establishing a rule for the division of risks, and with a knowledge of the facts, they insure property in one class properly falling in another, thereby violating the by-law, still the policy issued will be valid and the company bound.<sup>80</sup> But it has also been held that an insurance company is not estopped from setting up the fact that a contract of insurance made through its agent is *ultra vires*, though its agent had led the other contracting party to believe that the company had power to make it, and though no pretense was set up by the company or its agent that the contract was *ultra vires* until a loss thereunder was known by all parties

acted on both sides": Sec. 6024, "Rule where the contract has been fully executed on either side"; Sec. 6025, "Rule where the contract has been executed by the party contracting with the corporation"; Sec. 6026, "Rule where the contract has been executed by the corporation"; Sec. 6028, "Doctrine that violation of charter or want of power cannot be set up collaterally"; Sec. 6029, "Cases where this doctrine has been applied"; Sec. 6030, "Who may not set up such violations or want of power"; Sec. 6031, "Illustrations of the foregoing."

<sup>78</sup> *Bloomington Mut. L. B. Assn. v. Blue*, 120 Ill. 121; 11 N. E. Rep. 331; 60 Am. Rep. 558. See last section herein.

<sup>79</sup> *Williams v. N. E. Mut. F. Ins. Co.*, 31 Me. 219.

<sup>80</sup> *Union etc. Ins. Co. v. Keyser*, 32 N. H. 313; 64 Am. Dec. 375.



to have occurred.<sup>81</sup> Therefore, charter provisions relating to executing a policy ought not, in the absence of words of restriction or a plain denial of such power, to be construed to limit the powers of the corporation or to prevent them from making parol contracts within the ordinary scope of their chartered powers.<sup>82</sup>

**§ 36. Parol Contract of Corporations—Statutory or Charter Provisions, Continued.**—It is even declared in a Massachusetts case<sup>83</sup> that the phraseology of statutes chartering insurance companies respecting the execution of policies should be regarded as consisting simply of enabling words not restraining the power which they confer to make contracts of which the policies are the evidence, and it was directly determined that the company had power to make an oral contract, although the charter gave authority to make contracts of insurance “in their name and by the signature of their president for the time being, or by the signature of such other person and in such form and with such ceremonies of authentication as they may by their rules and by-laws direct.” So it is declared in a New York case<sup>84</sup> that “whatever doubts may formerly have existed as to the validity of parol contracts of insurance made by insurance companies authorized by their charters to make insurance by issuing policies, it is now settled that they are valid. It is equally well settled that parol contracts of such companies to effect an insurance by issuing policies are valid,” and it was also held in an Indiana case<sup>85</sup> that the company, unless ex-

<sup>81</sup> *Webster v. Buffalo Ins. Co.*, 7 Fed. Rep. 399. See *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Hartford Ins. Co. v. Wilcox*, 57 Ill. 180; *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *Putman v. Home Ins. Co.*, 123 Mass. 324, 328; 25 Am. Rep. 93.

<sup>82</sup> *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.), 448; 77 Am. Dec. 419; *New England Ins. Co. v. Robinson*, 25 Ind. 536; *Baile v. St. Joseph F. Ins. Co.*, 73 Mo. 371.

<sup>83</sup> *Sanborn v. Firemen's Ins. Co.*, 82 Mass. 448; 77 Am. Dec. 419; see, also, *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560.

<sup>84</sup> *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402; 10 Am. Rep. 495. See, also, *Walker v. Metropolitan Ins. Co.*, 56 Me. 371; *First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 319.

<sup>85</sup> *N. E. F. & M. Ins. Co. v. Robinson*, 25 Ind. 536.

pressly restrained by charter, might make a valid insurance by parol. And the facts that an insurance company is bound by its charter to print on the face of its policies all conditions, and that certain officers shall sign all the policies or contracts made, etc., do not prohibit the company from making oral contracts of insurance,<sup>86</sup> although under a similar state of facts a case was decided contra in the Missouri state court.<sup>87</sup> It is held in *Constant v. Insurance Company*<sup>88</sup> that although by its act of incorporation an insurance company can make a valid insurance only by a policy attested by the president, secretary, and the seal of the corporation, yet before such instruments are attested in due form the president or secretary, or whoever else may act as a general agent of the company, may make agreements and even parol promises as to the terms on which a policy shall be issued, so that a court of equity will compel the company to execute the contract specifically,<sup>89</sup> and it is generally held in like cases that a parol agreement for insurance is valid.<sup>90</sup> But a mere collateral promise or representation which does not involve the execution of a policy of insurance is not within the scope of the general authority of an officer or agent of such a corporation, and cannot be enforced.<sup>91</sup> The following cases further illustrate the rule as to agreements for insurance: Thus, an agreement for insurance was made with an insurance company through its agent, and on the next day the policy, dated as of the preceding day, was executed, delivered, and received in perfect accordance with that agreement, and it was held that the company was liable for a loss occurring after the agreement was entered into and before the policy was executed, although the

<sup>86</sup> *Henning v. United States Ins. Co.*, 2 Dill. (C. C.) 26.

<sup>87</sup> *Henning v. United States Ins. Co.*, 47 Mo. 425; 4 Am. Rep. 332.

<sup>88</sup> 3 Wall. Jr. (C. C.), 313.

<sup>89</sup> See, also, *Security etc. Ins. Co. v. Kentucky M. Ins. Co.*, 7 Bush (Ky.), 81; 3 Am. Rep. 301.

<sup>90</sup> *Cooke v. Aetna Ins. Co.*, 7 Daly (N. Y.), 555; *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Ide v. Phoenix Ins. Co.*, 2 Biss. (C. C.) 333; *Fish v. Liverpool etc. Ins. Co.*, 44 N. Y. 538; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171; 17 Am. Rep. 322; *Jones v. Provincial Ins. Co.*, 16 U. C. Q. B. 477.

<sup>91</sup> *Constant v. Insurance Co.*, 3 Wall. Jr. (C. C.) 313.

charter of the company provided that all policies of insurance should be subscribed by the president and signed and sealed by the secretary.<sup>92</sup> Again, where the charter confers upon an insurance company power "generally to do and perform all things relative to the object of the association," and provided in a subsequent section that "all policies or contracts of insurance" shall be subscribed by the president or some other officer designated by the board of directors for that purpose, the latter provision does not disable the company from binding itself by contracts for policies and immediate insurance executed in other modes and by other agents, but merely prescribes the manner in which the final contract or policy shall be executed.<sup>93</sup> So a provision in a company's charter requiring that "all policies and contracts of insurance . . . shall be subscribed by the president" relates only to executed insurances, and does not abridge the common-law right to make an oral executory contract for insurance.<sup>94</sup>

**§ 37. Parol Contract for Insurance Subject to Usual Provisions of Policy.**—A parol contract for insurance is in effect the contract of the company as expressed in the policies commonly issued by them, unless otherwise agreed upon,<sup>95</sup> and is to be regarded as made upon the terms and subject to the conditions in the ordinary forms of policies used by the company at the time.<sup>96</sup> So where plaintiff applied to defendant's agent for a policy of marine insurance on certain goods and paid the premium, but the agent said it was not his custom to give a policy, and that it was unnecessary, and gave him a receipt specifying the risk insured, but containing no condi-

<sup>92</sup> *Davenport v. Peoria etc. Ins. Co.*, 17 Iowa, 276.

<sup>93</sup> *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; 15 Am. Rep. 612.

<sup>94</sup> *Security F. Ins. Co. v. Kentucky M. Ins. Co.*, 7 Bush (Ky.), 81; 3 Am. Rep. 301.

<sup>95</sup> *Hubbard v. Hartford F. Ins. Co.*, 33 Iowa, 325; 11 Am. Rep. 125; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549; 35 N. E. Rep. 1060; *Smith v. State Ins. Co.*, 64 Iowa, 710.

<sup>96</sup> *Eureka Ins. Co. v. Robinson etc. Co.*, 56 Pa. St. 256; 94 Am. Dec. 65; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594; 19 Am. Rep. 305; *Salisbury v. Hekla F. Ins. Co.*, 32 Minn. 456; *State F. Ins. Co. v. Porter*, 3 Grant Cas. (Pa.) 123.

tions, it was held that the contract was governed by the limitations and conditions contained in the policies ordinarily used by the company.<sup>97</sup> If the insurer, however, enters into an oral contract of insurance, and at the same time agrees to issue a policy which it subsequently refuses to do, it cannot claim that the insured's right of recovery is defeated by the violation of any provisions which the policy, if issued, would have contained.<sup>98</sup> But if a policy is issued in pursuance of a verbal agreement, and assured receives it, but it is void because of noncompliance with a statutory form, the presumption is that the terms of the oral contract conform with those of the written policy.<sup>99</sup>

**§ 38. Parol Agreement for Insurance may be Specifically Enforced, or Court may Award Damages.**—An oral contract to issue a policy of insurance is binding and may be specifically enforced, or the court may award damages the same as in an action on an executed policy.<sup>100</sup> In a New Hampshire case<sup>101</sup> an agreement was made with the agent of

<sup>97</sup> *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594; 19 Am. Rep. 305, and note, 309. See, also, *Barre v. Council Bluffs Ins. Co.*, 78 Iowa, 609; *Relief F. Ins. Co. v. Shaw*, 94 U. S. 574; *Salisbury v. Hekla F. Ins. Co.*, 32 Minn. 458; *Smith v. State Ins. Co.*, 64 Iowa, 716; *Lipman v. Niagara F. Ins. Co.*, 121 N. Y. 454; *McCann v. Aetna Ins. Co.*, 3 Nev. 198; *Eames v. Home Ins. Co.*, 94 U. S. 621.

<sup>98</sup> *Hardwick v. State Ins. Co.*, 23 Or. 290; 31 Pac. Rep. 656; 22 Ins. L. J. 262.

<sup>99</sup> *Green v. Liverpool etc. Ins. Co. (Iowa)*, 60 N. W. Rep. 180. See *Howard Ins. Co. v. Owens*, 94 Ky. 197.

<sup>100</sup> *Security F. Ins. Co. v. Kentucky M. Ins. Co.*, 7 Bush (Ky.), 81; 3 Am. Rep. 301. See *Amer. Horse Ins. Co. v. Patterson*, 28 Ind. 17; *Gerrish v. German Ins. Co.*, 55 N. H. 355; *Gold v. Sun Ins. Co.*, 73 Cal. 216; *Jones v. Provincial Ins. Co.*, 16 U. C. Q. B. 477; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Humphrey v. Hartford F. Ins. Co.*, 15 Blatchf. (C. C.) 35, 504; *Phoenix Ins. Co. v. Ryland*, 69 Md. 437; 1 Law Rep. Annot. 548; *Peoria etc. Ins. Co. v. Walser*, 22 Ind. 73; *Northwestern Iron Co. v. Aetna Ins. Co.*, 23 Wis. 160; 99 Am. Dec. 145; *Rhodes v. Ry. Pass. Ins. Co.*, 5 Lans. (N. Y.) 71; *Wooddy v. Old Dominion Ins. Co.*, 31 Gratt. 362; 31 Am. Rep. 732; *Home Ins. Co. v. Adler*, 77 Ala. 242; *Dunning v. Phoenix Ins. Co.*, 68 Ill. 414; *Kelly v. Connecticut Ins. Co.*, 10 Bosw. (N. Y.) 82; *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402; 10 Am. Rep. 495; *Taylor v. Merchants' Ins. Co.*, 9 How. (U. S.) 390.

<sup>101</sup> *Gerrish v. German Ins. Co.*, 55 N. H. 355.

the company for insurance against fire for one year, commencing the risk at noon, September 30, 1873. The premium was paid to the agent and he agreed to procure and deliver the policy. Before this was done, and on October 1, 1873, a loss occurred. The requisite proofs of loss were made and a policy demanded and payment of the amount insured, which demands were refused. Upon a bill in equity therefor it was decided that the court had jurisdiction to compel a delivery of the policy and specific performance, and that it would, to avoid circuity of action, decree payment of the loss. So specific performance of an executory parol contract to insure a marine risk may be compelled in equity after the loss has occurred, when it appears that the voyage was undertaken on the understanding that the risk had been accepted, and that the writing to effect the insurance would be duly made, and that the premium would be paid when required according to usage;<sup>102</sup> and an oral promise by the president of an insurance company to make a policy of insurance is a contract binding on the company, and a court of equity will compel its specific performance.<sup>103</sup> Again, if the agents of the A, B, C, D, and E insurance companies agree with a party to insure her premises in the A, B, C, and D companies, she has against these four, after destruction thereof by fire, a claim for the loss, even though the policies have not been delivered to her, but none against the E, although the E had also written out a policy for her. Equity will only consider that to be done which was agreed to be done.<sup>104</sup> So equity may compel the issuance and delivery of an insurance policy after the loss, and enforce the payment of it, as if made in advance, where there has been a valid agreement for one before the loss, even where the contract was by

<sup>102</sup> *Phoenix Ins. Co. v. Ryland*, 69 Ind. 437; 1 Law Rep. Annot. 548.

<sup>103</sup> *Commercial Mut. Mar. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318; see *Union etc. Ins. Co. v. Commercial etc. Ins. Co.*, 2 Curt. (C. C.) 524; *New England etc. Ins. Co. v. Robinson*, 25 Ind. 536; *First Baptist Church v. Brooklyn Ins. Co.*, 18 Barb. (N. Y.) 69; *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. (N. Y.) 82.

<sup>104</sup> *Fitton v. Fire Ins. Assn.*, 20 Fed. Rep. 766.

parol and the charter of the company requires all policies to be in writing.<sup>105</sup>

**§ 39. Parol Contract—Statute of Frauds.**—In the United States supreme court it is held that the statute of frauds does not require that a promise to make a policy of insurance should be in writing,<sup>106</sup> nor does the statute make a writing necessary in Alabama,<sup>107</sup> nor in Kentucky.<sup>108</sup> So an oral contract of insurance for one year including its date is a contract to be performed within a year, and is not within the statute of frauds,<sup>109</sup> and an agreement to insure for even three or more years, where the contingency may happen within a year, is not within the statute.<sup>110</sup> So a verbal agreement of renewal which is not by its terms to endure for a longer period than one year, though it may continue for an indefinite period, is not within the statute.<sup>111</sup> But the contract may be divisible and partly within the statute, and void as to that part and valid as to the other part, as in case of a parol agreement to answer for loss by fire, and for the default and miscarriage of another.<sup>112</sup>

**§ 40. How far Parol Contract Merged in Written Agreement.**—A parol contract to issue a policy is not merged in a written policy which does not cover all the branches and elements of the parol contract, and which

<sup>105</sup> *Franklin F. Ins. Co. v. Taylor*, 52 Miss. 441. See *Ellis v. Albany Ins. Co.*, 50 N. Y. 495, and note.

<sup>106</sup> *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318; 2 Curt. (C. C.) 524.

<sup>107</sup> *Gold L. Ins. Co. v. Mayes*, 61 Ala. 163.

<sup>108</sup> *Howard Ins. Co. v. Owens*, 94 Ky. 197; 21 S. W. Rep. 1037; *Phoenix Ins. Co. v. Spiers*, 87 Ky. 236. See, also, *Wiebeler v. Milwaukee etc. Ins. Co.*, 30 Minn. 464.

<sup>109</sup> *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 448; 77 Am. Dec. 419; *Howard Ins. Co. v. Owen*, 94 Ky. 197; 14 Ky. L. Rep. 881. See, also, *Walker v. Metropolitan Ins. Co.*, 56 Me. 371.

<sup>110</sup> *Morse v. Minnesota Ry. Co.*, 30 Minn. 464. See *Van Loan v. Farmers' Mut. F. Ins. Assn.*, 24 Hun (N. Y.), 132.

<sup>111</sup> *First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305; s. c. 18 Barb. (N. Y.) 69.

<sup>112</sup> *Mobile Marine etc. Ins. Co. v. McMillan*, 31 Ala. 74.

the company does not admit as binding upon it.<sup>113</sup> So the issuing in consequence of a parol agreement of a policy containing material errors resulting from a mistake of the agent of the insurers in communicating the facts to them, and the agent's error in requiring the insured to pay a premium which is less than the rate agreed upon and less than the agent was authorized to insure at, does not impair the liability of the insurers upon the original agreement,<sup>114</sup> and where the insurers on receiving a premium agreed to deliver a policy covering specific property, and afterward sent a policy varying from the terms of the contract and a loss occurred, it was decided that a recovery might be had in accordance with the terms of the insurance contracted for, it appearing that the policy was received by a clerk and its provisions not known to the insured till after the fire.<sup>115</sup> So where the terms of an order to insure have been materially departed from in the policy by fraud or mistake, the order will be considered as containing the contract between the parties. But the order can be resorted to only in so far as it varies from the policy; in all other respects the policy should be considered as the contract.<sup>116</sup> And if an insurance company receives the premium paid to its agent who made the contract and forwarded the policy, it is bound by the contract made by him, although by mistake it is not correctly stated in the policy.<sup>117</sup> It may be stated that, as a general rule, the written contract will be presumed to embody therein all previous verbal agreements of the parties and will in the absence of fraud or mistake be conclusive upon them.<sup>118</sup>

§ 41. **Parol Contract—Renewal.**—A company through its authorized agent, may contract by parol for the renewal of a policy, although it be stipulated on the face of the existing

<sup>113</sup> *Nebraska etc. Ins. Co. v. Seivers*, 27 Neb. 541; 43 N. W. Rep. 351.

<sup>114</sup> *Bernton v. Orient etc. Ins. Co.*, 8 Bosw. (N. Y.) 448.

<sup>115</sup> *Franklin Ins. Co. v. Hewitt*, 3 B. Mon. (Ky.) 231.

<sup>116</sup> *Delaware Ins. Co. v. Hogan*, 2 Wash. (C. C.) 4.

<sup>117</sup> *Abraham v. North German Ins. Co. (C. C. Iowa)*, 40 Fed. Rep. 717.

<sup>118</sup> *McLaughlin v. Equitable L. Assur. Co.*, 38 Neb. 725; 57 N. W. Rep. 557.

policy that it shall not be renewed in that manner.<sup>119</sup> And an agreement to continue an insurance is valid, and a recovery may be had before the issuance of the policy or the payment of the premium.<sup>120</sup> But the contract must be complete as in cases of original insurance,<sup>121</sup> and mere loose general conversation relating to the renewal of a policy, had between the assured and an agent authorized to renew policies, cannot be deemed equivalent to a renewal.<sup>122</sup> In *Benjamin v. Saratoga Mutual Fire Insurance Company*<sup>123</sup> a policy of insurance was issued to plaintiff as agent of the owners. Plaintiff had an interest in the property as mortgagee, of which he informed the insurers. Afterward he obtained title by foreclosure. He notified the insurers of this and of the fact that he had agreed to convey to a third person. They consented that the policy should remain valid till the vendee's title was perfected and it was held that this agreement was equivalent to issuing a new policy to the plaintiff. But where an insurance agent is questioned as to whether the company would bind or renew the policy, the agent's silence does not operate to impose a contractual relation upon the company. In such case it is incumbent upon the party to repeat his question and take further action if he wishes to obtain assent of the company.<sup>124</sup>

<sup>119</sup> *Cohen v. Continental F. Ins. Co.*, 87 Tex. 325; 3 S. W. Rep. 296; 60 Am. Rep. 24. See *Giddings v. Phoenix Ins. Co.*, 90 Mo. 272, 277; *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6. Examine as to specialties, *Firemen's Ins. Co. v. Floss*, 67 Md. 403.

<sup>120</sup> *Springer v. Anglo-Nevada Assur. Corp.*, 33 N. Y. 543; 11 N. Y. Supp. 533. See *Waince v. Milford Mut. F. Ins. Co.*, 153 Mass. 335.

<sup>121</sup> *Johnson v. Com. F. Ins. Co.*, 84 Ky. 470; *King v. Hekla Ins. Co.*, 58 Wis. 508; *Dinning v. Phoenix Ins. Co.*, 68 Ill. 414, 418.

<sup>122</sup> *O'Reilly v. London Assur. Corp.*, 101 N. Y. 575. See, also, *Oroghan v. New Y. Underwriters' Agency*, 53 Ga. 109, 111.

<sup>123</sup> 17 N. Y. 415.

<sup>124</sup> *Royal Ins. Co. v. Beatty*, 119 Pa. St. 6; 11 Cent. Rep. 442; 12 Atl. Rep. 697; 5 Pa. (L. ed.) 366.



## CHAPTER IV.

### REQUISITES OF VALID CONTRACT—COMPLETION OF CONTRACT.

#### *SUBDIV. I. Requisites of Valid Contract.*

##### *II. Completion of Contract: Proposal and Acceptance.*

##### *III. Completion of Contract: Prepayment of Premium.*

##### *IV. Completion of Contract: Delivery of Policy: Knowledge of Loss.*

#### *SUBDIV. I. Requisites of Valid Contract.*

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- § 65. Same subject: Effect of memorandum—Binding slip, indorsement, etc.
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- § 70. Prepayment of premium: Condition precedent.
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- § 76. Prepayment of premium may be waived.
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- § 80. Prepayment—Credit may be given.
- § 81. Prepayment—Mutual credits—Application on agent's debt.
- § 82. Where there are mutual credits.
- § 83. Crediting premium on agent's indebtedness to applicant.
- § 84. Prepayment—Course of dealings allowing credit.
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*SUBDIV. IV. Completion of Contract: Delivery of Policy: Knowledge of Loss.*

- § 90. Delivery of policy not necessary to complete contract.
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- § 92. Agreement to deliver policy—Demand unnecessary.
- § 93. There may be a constructive delivery.
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- § 105. Loss before date of contract—Retroactive policy.
- § 106. Where both parties know of loss when contract made or executed.
- § 107. Knowledge of loss by assured before and after risk attaches.
- § 108. Assured not obligated to notify company of loss before delivery of policy where risk has attached.

*SUBDIV. 1. Requisites of Valid Contract.*

§ 43. **Requisites of a Valid Contract of Insurance.**—To constitute a valid contract of insurance it is necessary that there should be (1) parties thereto; (2) a premium, (3) a subject matter, (4) an insurable interest, (5) certain risks or perils, (6) duration of the risk, (7) the amount insured.<sup>1</sup> And there can be no complete contract of insurance, unless all these essentials exist, either expressly or by implication. But “neither the times and amounts of payments by the assured, nor the modes of estimating or securing the payment of the sum to be paid by the insurers, affect the question whether the agreement between them is a contract of insurance. All that is requisite to constitute such a contract is the payment of the consideration by the one and the promise of the other to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract.”<sup>2</sup> It is also necessary that the parties be those capable of contracting,<sup>3</sup> and that the risk be a legal one, not repugnant to public policy nor positive prohibition, nor occasioned by the insurer’s own fraud or misconduct, nor an infringement of the rights of persons not parties to the contract.<sup>4</sup>

<sup>1</sup> The essentials of a contract of insurance are a subject matter, the risk insured against, the amount, duration of the risk, and the premium: *Tyler v. New Amsterdam etc. Ins. Co.*, 4 Rob. (N. Y.) 151; *First Baptist Church v. Brooklyn Ins. Co.*, 23 N. Y. 153. Essentials are, the premises, the risk, the amount, the time the risk should continue, and the premium: *Strohn v. Hartford F. Ins. Co.*, 37 Wis. 625; 19 Am. Rep. 277. The substantial elements of a contract of insurance are the payment of a consideration by one party and the promise of the other to pay an agreed amount upon the happening of the specified contingency, it being understood that the former party had an insurable interest in the subject matter: *Bolton v. Bolton*, 73 Mo. 299, 303. To render the contract complete, there should be a matter to form its subject, and this matter should be exposed to the hazards of the sea: *Emerigon on Insurance*, Meredith’s ed., c. i, secs. 1, 2, pp. 5, 11. Newspaper contract: If one is induced to buy or to subscribe for a copy of a newspaper by reason of a promise to pay a certain sum of money to his heirs, in case of death by accident within a specified and limited time, such person to be identified by having the paper in his possession, it is a contract of insurance: *Commonwealth v. Philadelphia Inquirer*, 15 Pa. Co. Rep. 463.

<sup>2</sup> *Gray, J.*, in *Commonwealth v. Weatherbee*, 105 Mass. 149, 160; *State v. Farmers’ etc. Assn.*, 18 Neb. 276.

<sup>3</sup> See sec. 34 herein.

<sup>4</sup> *Bell v. Western etc. Ins. Co.*, 5 Rob. (La.) 423; 39 Am. Dec. 542; 1 *Phillips on Insurance*, 3d ed., 492, sec. 906. See sec. 34 herein.

§ 44. **Requisites of a Valid Parol Contract.**—A parol contract for insurance must contain all the essentials of a valid agreement so that nothing remains to be done but to fill up and deliver the policy on the one hand, and to pay the premium on the other;<sup>5</sup> and the contract must be fairly entered into for a good consideration between parties competent to contract,<sup>6</sup> and must otherwise conform to the rules given in the last section in regard to legality of the contract.

§ 45. **Minds of the Parties must Meet on all Essentials of Contract.**—There must be a meeting of minds upon all the essentials of a valid contract of insurance. If any of the material details remain to be determined, the contract is not complete.<sup>7</sup> In brief nothing should be left open for future determination. The assent must be mutual, since this meeting of minds is vital to the life of the contract. This obligation is correlative, and depends upon the acts of the parties themselves, and if one party is not bound it necessarily follows that there is no obligation on the other party.<sup>8</sup> In case the correspondence between the parties shows that their minds never met with respect to the terms, there is no contract, nor is the company bound in such case by mailing to the applicant a policy which he is not bound to accept.<sup>9</sup> But the terms being specified, the minds of the parties meet when the insurer signifies his acceptance of the application

<sup>5</sup> *People's Ins. Co. v. Paddon*, 8 Bradw. (Ill.) 447. See, also, *Sandford v. Trust F. Ins. Co.*, 11 Paige (N. Y.), 547; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Kentucky M. Ins. Co. v. Jenks*, 5 Ind. 96; *Franklin Ins. Co. v. Taylor*, 52 Miss. 441; *Hartford Ins. Co. v. Wilcox*, 57 Ill. 180; *Tyler v. New Amsterdam etc. Ins. Co.*, 4 Rob. (N. Y.) 151; *Real Estate M. F. Ins. Co. v. Roessle*, 1 Gray (Mass.), 336.

<sup>6</sup> *Hartford F. Ins. Co. v. Farriah*, 73 Ill. 166.

<sup>7</sup> *Kimball v. Lion Ins. Co.*, 17 Fed. Rep. 625, 626; *Goddard v. Insurance Co.*, 106 Mass. 56; 11 Am. Rep. 307; *Covenant M. B. Assn. v. Conway*, 10 Brad. (Ill.) 348; *Mutual L. Ins. Co. v. Young*, 23 Wall. (U. S.) 85; *Home Ins. Co. v. Adler*, 71 Ala. 516; *Trustees etc. v. Brooklyn F. Ins. Co.*, 28 N. Y. 153; *Serane v. Portland*, 9 Mich. 493.

<sup>8</sup> *Insurance Co. v. Young*, 23 Wall. (U. S.) 85; *Strohn v. Hartford Ins. Co.*, 37 Wis. 625; 19 Am. Rep. 777; *Hallock v. Insurance Co.*, 27 N. J. L. 645; *Eliassen v. Henshaw*, 4 Wheat. (U. S.) 228.

<sup>9</sup> *Hamblet v. City Ins. Co.*, 36 Fed. 118. See *Sheldon v. Hekla F. Ins. Co.*, 65 Wis. 436.

to the applicant.<sup>10</sup> Though where an undated note with a blank application was given to an agent of an insurance company, with an agreement by the latter that such acts constituted an agreement of insurance, and that when the owner gave the company a description of the property the policy should issue, and the note and application be filled out, this does not constitute a contract of insurance.<sup>11</sup> In another case the defendant's agent agreed to insure one C. by an "open policy" upon tobacco belonging to C. and others, stored in C.'s warehouse at a certain rate per annum, the amount insured being variable from time to time as the amount of tobacco in the store should vary. The time for which the insurance should continue was not fixed, and no premium was received by the agent, on the ground that he could not determine what amount of premium would become due under the policy. After this agreement plaintiff's tobacco stored in the warehouse was destroyed by fire, and it was held that in the absence of any definite agreement as to the duration of the risk there was no complete contract of insurance.<sup>12</sup> Again, where the agent upon application gave a receipt for the premium, which contained only a brief statement of the risk insured, specifying the rate of the premium, amount of insurance, the property, the time insured, but did not specify the peril or risk insured against, it was held not a contract, but merely evidence that the insured was entitled to a contract in the usual form, and that the usual policy must be looked to to ascertain the limitations and conditions of the contract and the company's liability.<sup>13</sup> So where there was an agreement to accept the risk as soon as the rate of premium should be fixed, which was not done, and a loss occurred, it was held that no insurance was effected, although the company entered the insurance in its order-book, and the number and date of the proposed policy in its ledger, and the secretary told the applicant to consider himself insured.<sup>14</sup> And the agreement will be complete, although a bond to pay assessments be

<sup>10</sup> *Schwartz v. Germania Ins. Co.*, 18 Minn. 448, 455.

<sup>11</sup> *Mattoon M. Co. v. Oshkosh Ins. Co.*, 69 Wis. 564; 35 N. W. Rep. 12.

<sup>12</sup> *Strohn v. Hartford F. Ins. Co.*, 37 Wis. 625; 19 Am. Rep. 777.

<sup>13</sup> *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594; 19 Am. Rep. 375.

<sup>14</sup> *Christy v. North Brit. Ins. Co.*, 3 Ct. Sess. (1st series, 1825) p. 360.

not executed, it being customary to do that upon delivery of the policy.<sup>15</sup> So a definite statement of the period of insurance is indispensable where the code requires a writing;<sup>16</sup> and an oral agreement by an insurance agent to take five thousand dollars upon mill property is not a completed contract of insurance if there was to be an apportionment between real and personal estate, and none had been made when the property was destroyed by fire.<sup>17</sup> Again, where it appeared that a "risk was taken for two thousand five hundred dollars at two per cent," and that the applicant's insurance broker threw a policy down on the secretary's desk and said, according to one witness, "There is a policy, if you take it," or according to another witness, "You are to make out a like policy," but tendered no premium till the premises to be insured were burned, it was held that the contract was too vague and indefinite to be binding;<sup>18</sup> and in a case where the application was for insurance on one house and the policy covered another which the agent thought was the one meant, there was no insurance, as the minds of the parties never met.<sup>19</sup> In another case the broker, without the owner's knowledge or authority, stated in the application that the risk was a machine shop, when in fact it was an organ factory, which was a more hazardous risk, and the owner accepted the policy expressed to be on a machine shop, and paid the premium. It was held in an action after loss that the policy was void, as the minds of the parties never met on the subject matter of the contract.<sup>20</sup> So again where two vessels with the same name were lying in port, and the insurance was on goods laden or to be laden on board a vessel of a certain name, and there was a doubt as to which vessel was intended, it was held, in the absence of proof that the goods were laden on board the vessel contemplated by the parties, that the policy did

<sup>15</sup> *Van Sloan v. Farmers' M. F. Ins. Co.*, 24 Hun (N. Y.), 132.

<sup>16</sup> *Clark v. Brand*, 62 Ga. 23, 25; Ga. Code, sec. 2794.

<sup>17</sup> *Kimball v. Lion Ins. Co.*, 17 Fed. Rep. 625.

<sup>18</sup> *Tyler v. New Amsterdam etc. Ins. Co.*, 4 Rob. (N. Y.) 151, 156.

<sup>19</sup> *Mead v. Westchester F. Ins. Co.*, 3 Hun (N. Y.), 608.

<sup>20</sup> *Goddard v. Monitor Mut. F. Ins. Co.*, 108 Mass. 56; 11 Am. Rep. 307.

not attach.<sup>21</sup> The rule is otherwise, however, if both parties intend the same subject, but make a mistake in the name.<sup>22</sup> But an insurer who has left the value of the property blank, to be determined after loss, is estopped to insist that an oral statement as to its value was material to the validity of the contract.<sup>23</sup>

**§ 46. Essentials Need not be Expressly Agreed upon—Prior Course of Dealing—Custom, etc.**—All the essentials need not, however, be expressly negotiated upon, since they may be understood, as where the terms of the usual policy are presumed to have been intended;<sup>24</sup> or where the usual rate of premium is presumed to have been meant;<sup>25</sup> or in case the duration of the risk is understood to be the same as in a former policy;<sup>26</sup> or where by custom or usage a certain course of dealing has been established.<sup>27</sup>

**§ 47. The Usual Rate of Premium will be Presumed to have been Intended,** and the minds of the parties will be assumed to have met and fixed the rate where a prior course of dealing would reasonably warrant such intentment. In *Audubon v. Excelsior Insurance Company*,<sup>28</sup> an application was made for insurance against fire of certain engravings similar in all respects to others on which the assurer had recently issued a policy to the same applicant. The parties agreed verbally upon all the terms of such insurance, except the rate of premium. The previous insurance was mentioned in the conversation, and the assurer promised to make out a policy and send it to the assured at a near date, and it was held

<sup>21</sup> *Sea Ins. Co. v. Fowler*, 21 Wend. (N. Y.) 600. See *Hughes v. Mercantile M. Ins. Co.*, 55 N. Y. 265; 14 Am. Rep. 254.

<sup>22</sup> *Hughes v. Mercantile M. Ins. Co.*, 55 N. Y. 265; 14 Am. Rep. 254; *Sanders v. Cooper*, 115 N. Y. 279.

<sup>23</sup> *Bardwell v. Conway etc. F. Ins. Co.*, 122 Mass. 90.

<sup>24</sup> *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 602; 19 Am. Rep. 305; *Boice v. Thames etc. Ins. Co.*, 38 Hun (N. Y.), 246; *Ruggles v. American C. Ins. Co.*, 114 N. Y. 415.

<sup>25</sup> *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 185; *Home Ins. Co. v. Adler*, 71 Ala. 516.

<sup>26</sup> *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 185.

<sup>27</sup> *Hartstrome v. Union Mut. Ins. Co.*, 36 N. Y. 172.

<sup>28</sup> 27 N. Y. 216.

that there was a contract to insure at the former rate of premium, and that recovery might be had for loss thereon though the policy was not made out when the loss happened. But if anything remains so that it appears that the rate of premium is not fixed, or that the usual rates do not apply, then the contract is incomplete,<sup>29</sup> and where there is a verbal agreement for a continuous insurance, and the rate of premium is changed, this terminates such agreement, and it requires a new bargain to effect a continuing contract.<sup>30</sup> So where an agent had authority to receive applications and forward the same with the premium for approval, and the policy issued was to be of effect as of the time of the agreement, and the usual rate was paid, but a loss occurred before the agent forwarded the risk and premium, the contract was held binding, although it was claimed by the company that it had not assented to the rate of premium.<sup>31</sup>

**§ 48. Both the Rate of Premium and the Duration of the Risk may be Understood, and a valid contract exist,** as where an agent had insured certain property for several years, and upon expiration of the insurance an application was made to him for another policy thereon, which was written by him, and thereupon he directed it to be reported to the defendant, and entered upon the register of completed contracts. The rate of premium and duration of the risk were not specified when the agreement was made, but the agent had been accustomed to give credit for premiums and to keep the policies until called for. Before delivery the property was burned, and it was held that the same term and rate of premium as the expired policy must have been intended, notwithstanding the amount of insurance was reduced in the last policy.<sup>32</sup>

**§ 49. The Rate of Premium and Amount may be Understood.**—An agreement to insure a cargo to be laden, provided the vessel sail within a given time, which agreement,

<sup>29</sup> *Orient Mut. Ins. Co. v. Wright*, 23 How. (U. S.) 401.

<sup>30</sup> *First Baptist Church v. Brooklyn F. Ins. Co.*, 28 N. Y. 153.

<sup>31</sup> *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645.

<sup>32</sup> *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 185. See, also, *Walker v. Metropolitan Ins. Co.*, 56 Me. 371.



though contingent as to the amount to be covered and the rate of premium, provides means for ascertaining them with certainty as soon as the lading is completed and the day of sailing fixed, is valid, and the insurers are bound to give a policy on the vessel's sailing within the given time, and the insured is bound to pay the premium accordingly.<sup>83</sup>

**§ 50. Whether Contract Exists may be Governed by Custom or Usage of the Parties or of the Insurance Business at a Place.** — It is well settled that insurers are bound to know the customs of a place where they transact business, and are assumed to have made their contracts in reference to such customs. So in a New York case, a custom had existed for many years, and had become an established usage and course of business. By this custom the insurance business was conducted at a certain place in the following manner: Persons engaged in receiving consignments of cotton at that place obtained from the insurer a certificate of insurance expressed to cover shipments of cotton from various points on the river to the holder of such certificate to said place. The holder kept a book in which he entered as received all shipments of the description specified in the certificate, with the values and requisite particulars, and after the end of each month he exhibited such pass-book to the insurer, and had the premium fixed. The fact of shipment was rarely known to the consignee or insurer before the termination of the risk. The defendants, a New York company, delivered to their agents an open policy of marine insurance for two hundred and fifty thousand dollars; a certificate of renewal of this policy, and an additional policy was thereafter issued for two hundred and fifty thousand dollars, and delivered to said agents at the same time a large number of certificates, one of which was issued to the plaintiff and pasted into his pass-book. The agents at the time made an entry in their pass-book, "To cover all cotton shipped by or for ac't of the following parties, valuation per bale annexed to each name." Then followed the names and value per bale. Thereafter the agents wrote on the original certificate to the plaintiff a renewal of the policy, and signed the same, and at

<sup>83</sup> *Buntin v. Orient etc. Ins. Co.*, 8 Bosw. 448.

the same time gave a renewal of the certificate for the same term. By instructions to the agents the certificates were covered by the policies, and considered as representing the policies, subject to the same terms and payable in like manner. Thereafter and before the termination of the renewal period a boat having cotton on board, consigned to the plaintiff on account of the persons named in the certificate, was destroyed with the cargo by fire. An action was brought demanding the issue of a formal policy and the amount due, and it was held that the defendants were liable, the certificate being declared to be in effect an open, continuous policy.<sup>34</sup> In another case, in the same state, a contract binding upon the company was permitted to be established by evidence that a custom existed between the plaintiffs and several insurance companies, including the defendant, by which applications were made for "not to exceed" a certain sum where the value of property upon which insurance was desired was not known at the time of the application, and that the company, not knowing the actual value of the property, had made insurances in like manner with certain of the other companies upon the property in various sums;<sup>35</sup> and a custom to consider that an open policy covered all cotton consigned to a party unless the bill of lading showed the contrary, binds the insurer in the absence of such reservation in the bill of lading.<sup>36</sup>

*SUBDIV. II. Completion of Contract: Proposal and Acceptance.*

**§ 53. Completion of Contract—Mutual Benefit Societies.**—In mutual benefit societies the by-laws and charter of the company are of great weight in determining what constitutes the completion of the contract, as where the by-laws provide that the beneficiary shall be named in the certificate, involving thereby the question whether the company has power to complete a contract otherwise than in the precise manner provided, and whether or not a compliance with the by-laws is not a con-

<sup>34</sup> *Hartshorne v. Union Mut. Ins. Co.*, 36 N. Y. 172.

<sup>35</sup> *Fabbri v. Mercantile Ins. Co.*, 6 Lans. (N. Y.) 446; *Id.*, 64 Barb. (N. Y.) 85.

<sup>36</sup> *Bramstein v. Crescent Mut. Ins. Co.*, 24 La. Ann. 589.

dition precedent. In New York it has been held that it is.<sup>37</sup> Where by the charter of the company the deposit of a premium note for a sum to be determined by the directors is made a condition precedent to receiving the policy, this condition must be complied with.<sup>38</sup> Where under the laws of a society no certificate was to be issued until full membership should be conferred, and a person made and signed an application for membership, attended one meeting, and was notified to attend the next, when full membership would be conferred, and at the time of the next meeting he was too ill to attend and died shortly after, it was held that the contract was not completed.<sup>39</sup> It has also been held that a person enrolled as a member of a mutual benefit association, without having signed the application required, cannot claim any insurance, even though he did not know that his application had never been received.<sup>40</sup> Although in another case it was determined that a valid contract of insurance existed between the owner of a schooner and an insurance company at the time of her loss, although on the application book of the company certain blanks left for the value of the vessel and the amount insured were not filled as provided in the by-laws.<sup>41</sup> In another case the by-law of the company required the execution of a premium note by the assignee before delivery to him of the approved policy, and the purchaser of insured property took an assignment of the policy and sent it to the secretary of the company for approval. This was given by indorsement on the policy, and entry on the company's books. The policy, however, was retained until the required premium note should be executed, which was agreed to be done. This was neglected, a loss occurred, and defendant was assessed as a policy holder. He refused to pay. A bill was filed against him by the company. The court dismissed the bill on the ground that the property was not in-

<sup>37</sup> *Bishop v. Empire Order, etc.*, 43 Hun (N. Y.), 472.

<sup>38</sup> *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333; sec. 34, ante.

<sup>39</sup> *Taylor v. Grand Lodge etc.* (N. Y. Sup. Ct. 1894), 29 N. Y. Supp. 773.

<sup>40</sup> *Supreme Lodge v. Grace*, 60 Tex. 569. But see *Somers v. Kansas Prot. Union*, 42 Kan. 619; 22 Pac. Rep. 702.

<sup>41</sup> *Dodd v. Gloucester Mut. F. Ins. Co.*, 120 Mass. 468.

sured.<sup>42</sup> In a Michigan case, however, the constitution and regulations of the lodge provided that the contract should be complete on examination of the applicant and approval of the application by the supreme lodge, and upon the signing the certificate and forwarding it to the subordinate lodge, which was done, but the subordinate lodge retained it on the ground of fraud in the application, and the court determined that the beneficiary might recover without producing the certificate, no fraud in the application being shown.<sup>43</sup> In a case which arose in Nebraska, an action being brought against a railroad relief association, it appeared that the by-laws of the association provided that those who desired to become members should make application in a certain manner, and also submit to a physical examination. W., on July 21st, stated his desire to become a member to a soliciting agent of the department, who gave written notice of W.'s application to the officers of the association, specifying July 21st as the day for the application to take effect. On July 22d, however, W. was taken sick. The prescribed manner of making the application was not complied with, nor was any physical examination made, and no request was made of W. for compliance with either requirement. His name was placed on the roll of members and an assessment deducted from his wages. On August 7th, the association, through its officers, was notified of W.'s disability, and subsequently tendered back his assessment in the form of a "time check," which he refused a few hours before his death. It was held that the company was estopped from denying the completion of the contract.<sup>44</sup> We have, however, already<sup>45</sup> given some attention to this question of the power of such corporations to make a parol contract of insurance, and have seen that while in some states the courts have been inclined to limit such corporations strictly to their statutory or charter powers, yet in other states a more liberal construction has been given.<sup>46</sup>

<sup>42</sup> *Cranberry Mut. F. Ins. Co. v. Hawk* (N. Y. 1888), 14 Atl. Rep. 745.

<sup>43</sup> *Lorcher v. Supreme L. K. of H.*, 72 Mich. 316; 40 N. W. Rep. 545.

<sup>44</sup> *Burlington Vol. Rel. Dep. v. White*, 41 Neb. 547; 59 N. W. Rep. 747, 751.

<sup>45</sup> Sec. 84, ante.

<sup>46</sup> See, also, *Bacon's Benefit Societies and Life Insurance*, sec. 147.

But, as we have stated, the by-laws, however, are made to govern the officers and members of the company, rather than persons who are about to become members;<sup>47</sup> and such persons are not members, but rather strangers, to the company in prior negotiations with it relative to granting insurance, for membership does not date before consummation of the contract.<sup>48</sup> The following general rules, however, govern in such companies in relation to the consummation of the contract. The contract is complete upon proposal and acceptance of the terms,<sup>49</sup> provided that the terms are so definitely agreed upon as to all the essentials that all that remains is to comply therewith;<sup>50</sup> and the company may waive provisions in its by-laws where they are for its benefit,<sup>51</sup> and acts done by an agent within the scope of his authority, although in disregard of the express provisions of the by-laws, may be binding on the company.<sup>52</sup>

**§ 54. Completion of Contract—Proposal or Application.**—The proposal for insurance may be made by written application or orally, and it is generally upon reliance of the facts stated therein that the insurer accepts the risk. A written application is now generally dispensed with by fire insurance companies. The application is not the contract, but a mere proposal for insurance.<sup>53</sup> No obligation rests upon the

<sup>47</sup> The court in *Somers v. Kansas Prot. Union*, 42 Kan. 619, 622· 22 Pac. Rep. 702; *Titworth v. Titworth*, 40 Kan. 571; 20 Pac. Rep. 213.

<sup>48</sup> *Eilenberg v. Protective M. F. Ins. Co.*, 89 Pa. St. 464; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 579; 29 Am. Rep. 271; *Cumberland Valley Mut. Prot. Co. v. Schell*, 29 Pa. St. 31; *Stratton v. Allen*, 16 N. J. Eq. 229.

<sup>49</sup> *Oliver v. American L. of H.* (Cal. 1882), 17 Am. L. Rev. 301.

<sup>50</sup> *Connecticut Mut. L. Ins. Co. v. Rudolph*, 45 Tex. 454; *Todd v. Piedmont etc. Ins. Co.*, 34 La. Ann. 63.

<sup>51</sup> *Splann v. Chew*, 60 Tex. 532; *Cumberland Val. Mut. Prot. Co. v. Schell*, 29 Pa. St. 31; *Manning v. A. O. U. W.*, 86 Ky. 136; 5 S. W. Rep. 385.

<sup>52</sup> *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Somers v. Kansas Prot. Union*, 42 Kan. 619; 22 Pac. Rep. 702; *Emery v. Boston M. Ins. Co.*, 138 Mass. 398.

<sup>53</sup> *Covenant M. B. Assn. v. Conway*, 10 Brad. (Ill.) 348; *McCully v. Phoenix Mut. L. Ins. Co.*, 18 W. Va. 782; *Heiman v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 157; *Schwartz v. Germania Ins. Co.*, 18 Minn. 448.

company to accept,<sup>54</sup> and it may reject the proposal even though there may have been a payment of part or even all of the premium.<sup>55</sup> So, where there is the payment by an applicant of the admission fee and an acceptance by him of a receipt stating that the policy is not to go into effect until the application has been approved and accepted, and there is a statement in the application that the annual dues must be paid and the policy actually delivered to the applicant, and the application is not accepted nor are the dues paid, there is no valid contract created. The payment of the admission fee under such circumstances creates no contract of insurance of itself.<sup>56</sup> There may be an acceptance for a limited period of time with the right reserved to reject: as in a case where a fire insurance company, having received an application for a policy, contracted to accept the risk for the term of thirty days from date, "unless the applicant is sooner notified of its rejection. If he receives no notice that the risk is rejected, the insurance will cease at the end of the thirty days, unless a regular policy has been issued." After expiration of the thirty days a loss occurred, no policy having been issued nor notice of rejection given; it was held that the company was not liable.<sup>57</sup> So the acceptance may be conditional.<sup>58</sup> If the application is not made in writing and there are no statements contained in any written application as to the risk or subject matter, then oral proof of such facts is admissible.<sup>59</sup> Though oral statements are not admissible, as a rule, to alter the application, if in writing,<sup>60</sup> for such application is itself the best evidence of its contents,<sup>61</sup> and

<sup>54</sup> *Insurance Co. v. Young*, 23 Wall. (U. S.) 85; *Harp v. Grangers' Mut. etc. Ins. Co.*, 49 Md. 309.

<sup>55</sup> *Otterbein v. Iowa State Ins. Co.*, 57 Iowa, 274; *Armstrong v. State Ins. Co.*, 61 Iowa, 212.

<sup>56</sup> *Weinfeld v. Mutual Res. F. L. Assn.*, 53 Fed. Rep. 208.

<sup>57</sup> *Barr v. North American Ins. Co.*, 61 Ind. 488.

<sup>58</sup> *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339.

<sup>59</sup> The court in *Hoose v. Prescott Ins. Co.*, 84 Mich. 309; 32 Cent. L. J. 228.

<sup>60</sup> *Ashworth v. Builders' Mut. F. Ins. Co.*, 112 Mass. 422; 17 Am. Rep. 117; *Jenkins v. Quincy Mut. F. Ins. Co.*, 7 Gray (Mass.), 370; *Tibbetts v. Hamilton Mut. Ins. Co.*, 3 Allen (Mass.), 569.

<sup>61</sup> *Lewis v. Hudmon*, 56 Ala. 186.  
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where the custom of the company has been to issue a new policy covering a former risk without a new written application therefor, the secretary of the company has authority to issue a new policy without a new written application, notwithstanding a by-law provides that all applications shall be examined and approved before a policy is issued.<sup>62</sup>

§ 55. **Completion of Contract—Acceptance Generally.** A proposition only becomes a binding contract when the party to whom it is made signifies his acceptance to the proposal,<sup>63</sup> so that in the absence of some provision to the contrary there must be an actual acceptance of the proposal for insurance, some act to bind the company, or some act must be done which is equivalent thereto, and from which the company cannot recede without liability.<sup>64</sup> If the act done by the insurer be such that a liability would exist against him were he to withdraw, or, in other words, if he has so acted that he cannot recede without liability, there is an acceptance, and the contract is complete;<sup>65</sup> and an acceptance of the policy by the insured will conclude the contract with the insurer.<sup>66</sup> In an action on a policy of insurance which had been filled up and signed, but not delivered, and on which no premiums had been paid, it is for the jury to determine what constitutes a reasonable time within which the insured should pay the premium and accept the policy.<sup>67</sup> It is also a question for the jury whether an application

<sup>62</sup> Zell v. Herman F. Mut. Ins. Co., 75 Wis. 521; 44 N. W. Rep. 828.

<sup>63</sup> Bentley v. Columbia Ins. Co., 17 N. Y. 421, 423; Hartford F. Ins. Co. v. Davenport, 37 Mich. 609.

<sup>64</sup> Markey v. Mutual B. Ins. Co., 103 Mass. 92; New England Ins. Co. v. Robinson, 25 Ind. 536; Hallock v. Insurance Co., 28 N. J. L. 278; Haskin v. Agricultural F. Ins. Co., 78 Va. 707; Shattuck v. Mutual L. Ins. Co., 4 Cliff. (C. C.) 598; Connecticut Mut. L. Ins. Co. v. Rudolph, 45 Tex. 454; Keim v. Home Mut. F. Ins. Co., 42 Mo. 38; 97 Am. Dec. 291; Heiman v. Phoenix Mut. L. Ins. Co., 17 Minn. 153; 10 Am. Rep. 154; Alabama Gold L. Ins. Co. v. Mayes, 61 Ala. 163; Schwartz v. Germania Ins. Co., 18 Minn. 448; Haden v. Farmers' etc. Ins. Co., 80 Va. 688.

<sup>65</sup> Mead v. Davidson, 3 Ad. & E. 303; Dunlop v. Higgins, 1 H. L. Cas. 38; Vasser v. Camp, 14 Barb. (N. Y.) 341; Kentucky Mut. Ins. Co. v. Jenks, 5 Ind. 96.

<sup>66</sup> Wallingford v. Home etc. Ins. Co., 30 Mo. 46; Hartford F. Ins. Co. v. Davenport, 37 Mich. 609.

<sup>67</sup> Baxter v. Massasoit Ins. Co., 13 Allen (Mass.), 320.

to an insurance company by a party desiring to be insured has been declined or not,<sup>68</sup> and if the policy ever attached, the insurer has a claim for premium; if otherwise, he has not.<sup>69</sup> So where upon the same day that an application for insurance was filed the company made out and signed the policy, it thereby ratified the application, and its consent was complete.<sup>70</sup> And when an open policy is issued "on property on board vessel," etc., "with such other risks as may be agreed on, as per indorsement hereon, accepted by the company," and the risk is agreed upon, the premium paid, and the indorsement made by the agent, the insurance is effected; but a different rule obtains where the risk is "to be accepted."<sup>71</sup>

**§ 56. Qualified Acceptance—Conditions Precedent.**—An acceptance may be qualified or made dependent upon the performance of some condition precedent, in which case notice of compliance therewith will bind the insurer. This is illustrated by a case where a person having an interest in an academy building applied to the agent of a mutual office for insurance, paid what cash was required, and gave the necessary premium note. The insurance company agreed to issue a policy on the application on certain alterations being made in the building, and on authority from the trustees of the academy to effect the insurance. These conditions were complied with, and the agent was notified to examine the building, which he did not do. It was held that the risk commenced from the time of the notice that the conditions were performed.<sup>72</sup> In case the policy does not conform to that contemplated by the application, there must be an acceptance of such policy, or there is no binding contract,<sup>73</sup> and if the time or place of acceptance is specified, the acceptance must conform thereto.<sup>74</sup>

<sup>68</sup> *Mutual etc. Ins. Co. v. Wise*, 34 Md. 532.

<sup>69</sup> *Cleveland v. Fittypiece*, 8 Mass. 392, 395; *Merchants' Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56, 61; *Hendricks v. Commercial Ins. Co.*, 8 Johns. 1; *Homer v. Dorr*, 10 Mass. 26; *Taylor v. Lowell*, 3 Mass. 331; 3 Am. Dec. 141; *Elbers v. United Ins. Co.*, 16 Johns. (N. Y.) 128.

<sup>70</sup> *Keime v. Home Mut. F. Ins. Co.*, 42 Mo. 38; 97 Am. Dec. 291.

<sup>71</sup> *Wars v. Maine Mut. M. Ins. Co.*, 61 Me. 537.

<sup>72</sup> *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339.

<sup>73</sup> *Insurance Co. v. Young*, 23 Wall. (U. S.) 85.

<sup>74</sup> *Eliason v. Henshaw*, 4 Wheat. (U. S.) 225.



§ 57. **Acceptance—Delay in Acting on Application.**—There is, as we have seen, no obligation resting upon the insurer to accept a proposal or application for insurance,<sup>75</sup> and therefore delay in acting thereon will not in itself warrant a presumption of acceptance.<sup>76</sup> Thus, in an Alabama case, a receipt was given by an agent reciting that the applicant was to be considered insured from date, "if said application shall be approved and accepted by said company." After several weeks the application was rejected, and it was held that no acceptance could be implied from such delay, even though the note for the premium was not surrendered, it not appearing that the agent claimed the power to contract.<sup>77</sup> So the company will not be bound by a mere delay of five months without reply to the proposal;<sup>78</sup> nor will unreasonable delay bind the company,<sup>79</sup> and where the application provided "the policy to bear date and take effect at noon of the day this application is approved," this was held to mean approval by the home or principal office, and that a delay of eighteen days before rejecting the application would not warrant a presumption of acceptance.<sup>80</sup> But where the agent, who knew of the rejection of the application, failed for eighteen days thereafter to notify the insured, and a fire occurred, the company is liable.<sup>81</sup> In another case an application for fire insurance was made to a mutual company August 7th, the application being subject to the approval of the directors, and was delivered to one of the directors August 9th. On the 19th of August the directors had a meeting for the transaction of special business, and no action was at that time taken on the application. August 30th the house was burned. September 25th, at the first regular meeting of the executive committee, the application was re-

<sup>75</sup> Sec. 53, herein.

<sup>76</sup> *Herman v. Phoenix Mut. L. Ins. Co.*, 17 Minn. 153; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; 27 Id. 645; 72 Am. Dec. 379; *Haskin v. Agricultural F. Ins. Co.*, 78 Va. 707.

<sup>77</sup> *Alabama Gold L. Ins. Co. v. Mayes*, 61 Ala. 163.

<sup>78</sup> *Insurance Co. v. Johnson*, 23 Pa. St. 72.

<sup>79</sup> *Misselhorn v. Mutual Res. F. L. Assn.*, 30 Fed. Rep. 545, per Brewer, J.

<sup>80</sup> *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; 5 Am. Rep. 64.

<sup>81</sup> *Moore v. New York etc. F. Ins. Co.*, 29 N. Y. 768.

jected, and the committee's action was approved by the directors. It was held that there was no such negligence on the part of the company as would entitle the plaintiff to recover.<sup>82</sup> In case of a proposal by mail an offer to insure should be accepted within a reasonable time, or the party might assume that it was rejected.<sup>83</sup> But if the company agrees to notify the applicant of rejection of his proposal, and receives the application and premium note, but fails to send such notification for seven months, and the property is burned in the meantime, this is such a delay as to render the company liable,<sup>84</sup> and if through negligence of the agent the application is not received or acted upon, until a loss occurs, the company is liable.<sup>85</sup>

**§ 58. When Applicant is not Bound to Accept Policy—Effect of Retention of Policy by Applicant.**—Where the policy does not conform in terms to the proposal, there is no obligation resting upon the applicant to accept it. Thus, in a New York case an agent, who had authority to solicit and make contracts for insurances, agreed to insure the plaintiff by a policy containing special provisions for refunding the money paid for premiums and received the plaintiff's note in part payment. The company tendered a policy without the provision, which policy the plaintiff refused. It was decided that the transaction did not constitute a binding contract.<sup>86</sup> If an application for insurance does not set forth all the provisions which the policy is to contain, and the agent represents that the policy will contain certain lawful stipulations, the policy must contain them, or the insured will not be bound to accept it.<sup>87</sup> In such case, however, it is incumbent upon the applicant, immediately on receipt of the policy, to notify the company of his refusal to accept the policy. In *Meyers v. Keystone etc. Insurance Company*,<sup>88</sup> it was determined that there was no sufficient ac-

<sup>82</sup> *Harp v. Grangers' Mut. F. Ins. Co.*, 49 Md. 307.

<sup>83</sup> *Thayer v. Middlesex Mut. F. Ins. Co.*, 10 Pick. (Mass.) 328.

<sup>84</sup> *Somerset F. Ins. Co. v. May*, 2 Week. Not. Cas. (Pa.) 43.

<sup>85</sup> *Fish v. Cottenet*, 44 N. Y. 538.

<sup>86</sup> *Tift v. Phoenix Mut. etc. Ins. Co.* 6 Lans. (N. Y.), 198.

<sup>87</sup> *American Ins. Co. v. Weiberger*, 74 Mo. 167.

<sup>88</sup> 27 Pa. St. 268; 67 Am. Dec. 462.

ceptance of the policy to make it binding. There the agent of the company agreed on certain terms for a policy which were not ratified by the company, but a new policy was sent with a request to return it if the terms were not satisfactory, and both policies were kept without complying with the terms of the letter. But in *Adams v. Eidam*,<sup>89</sup> it was held that a finding that an applicant receives and retains without objection policies made out and sent to him is equivalent to a finding that he had accepted them. In a Massachusetts case<sup>90</sup> an insurance company issued a policy in the name of B., and sent it to B.'s agent, by whom it was returned with a request to make it payable to K., B.'s mortgagee. The first policy was canceled and a new policy was made out to K., but without B.'s knowledge of such return and substitution. The court determined that although the new policy was kept seven months by K., this did not constitute an acceptance thereof on the part of B., notwithstanding B. admitted that K.'s possession was not fraudulent. In a New York case<sup>91</sup> it appeared that the agent of a company gave to A. a life insurance policy and received his note and a check therefor. A written agreement was entered into, providing that the policy should be returned unless the agent should obtain the surrender value or paid-up policies for certain policies delivered by A. to the agent. The agent failed to accomplish this result. The court held that no valid contract was created until the condition was complied with, and that it was immaterial whether the agent of the company had power to make such conditional delivery or not, since if he had not, the result would still be that no contract was made. But the insured is not justified in refusing to receive a policy notwithstanding the agent falsely states that the policies of a rival company did not contain a certain clause where the insured subsequently makes an application therefor, after having been furnished with a blank policy which he retained about ten days

<sup>89</sup> 43 N. W. Rep. (Minn.) 690.

<sup>90</sup> *Bennett v. City Ins. Co.*, 115 Mass. 241.

<sup>91</sup> *Harnickell v. New York L. Ins. Co.*, 111 N. Y. 119; 40 Hun (N. Y.), 558; 19 N. Y. 98; 19 N. E. Rep. 632.

and having been requested by the agent to compare it with that used by the other company.<sup>92</sup>

**§ 59. Agent's Agreement—Liability not to Attach till Approved.**—If the application provides that no liability shall attach until approval by the principal, such approval is necessary to complete the contract, and if a loss occurs before such approval, the insurance company is not liable, though the premium has been delivered to the local agent.<sup>93</sup> If an agent has authority merely to receive applications and forward the same for approval and to deliver policies and receive premiums, and the applicant knows the extent of the agent's authority, but that the policy was to be issued by the general agent on his approval of the risk, and the risk is rejected after the property is burned, but without knowledge of the fact, there is no valid contract of insurance.<sup>94</sup> In another case an insurance solicitor received a written application for insurance, with the understanding that no liability should attach until approval by the company. The solicitor also accepted the premium and gave a receipt therefor providing that it should be returned in case of nonapproval of the risk. The solicitor mailed the application and premium to the company, but the company never received or heard of them, no policy was issued, and the premium was not returned to the applicant. It was decided that the company was not liable.<sup>95</sup> In a New York case a general agent appointed a subagent, with authority to make contracts for insurance which should be binding upon the company from the date of application until, upon reference to the general agent, they should be rejected. The plaintiff claimed to have been appointed a subagent, and sent a letter proposing insurance. The letter was delivered to the general agent. There was conflicting evidence as to whether the latter read plaintiff's letter until after he had knowledge of the fire; but after

<sup>92</sup> *American etc. Ins. Co. v. Wilder*, 39 Minn. 350; 1 L. R. App. 671.

<sup>93</sup> *Pickett v. German F. Co.*, 39 Kan. 697; 18 Pac. Rep. 903; *Jacobs v. New York L. Ins. Co.*, 71 Miss. 658; 29 Atl. Rep. 606.

<sup>94</sup> *Fleming v. Hartford F. Ins. Co.*, 42 Wis. 616.

<sup>95</sup> *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa, 340; 32 N. W. Rep. 371. This was a fire risk; the agent was a soliciting agent only.

he knew of the fire he executed and delivered a policy to the plaintiff, and it was held that the policy was invalid, and that the agent had no authority to issue a policy to himself.<sup>96</sup>

**§ 60. Approval may be Implied from the Circumstances.**—Receipt of a premium from a local agent, by the general agent, followed by an instruction from the latter to the former to cancel the policy, will be such a recognition of the existence of the policy as to constitute the requisite "approval" of the general agent for its validity;<sup>97</sup> and if after the execution and delivery of a policy by an agent of the insurers duly authorized to make insurance upon vessels and who had in fact previously insured the same vessel for the same applicant, a memorandum is signed by the insured that the insurance is to take effect "when approved by the general agent at Buffalo," and a loss occurs, the insurers are liable although the insurance was disapproved by the general agent, who directed the agent to return the premium note and cancel the policy; no notice of the disapproval having been given to the insured till after the loss.<sup>98</sup> Again, when the insurance was to inure from the time of the payment of the premium to the agent, provided the company approved the risk, and the agent having had negotiations with a party accepted a premium for insurance for a certain sum to commence then, and gave a receipt therefor as agent. Before the premium was received by the company or the policy made out the premises were burned. Had the premium been immediately remitted by the agent to the home office, it would have been received there before the loss. In the lower court it was held that there could be no binding contract until the receipt of the premium and approval of the risk at the home office. The court of errors, however, decided that a recovery could be had.<sup>99</sup>

**§ 61. Oral Agreement of Agent may be Controlled by Application.**—If the application particularly specifies when

<sup>96</sup> *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421.

<sup>97</sup> *Ætna Ins. Co. v. Maguire*, 51 Ill. 342.

<sup>98</sup> *Insurance Co. v. Webster*, 6 Wall. (U. S.) 129.

<sup>99</sup> *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; 6 Johns. Ch. (N. Y.) 485.

the contract will take effect, this, it is held, will control a contemporaneous oral agreement differing in terms therefrom, and made with the agent of the insurer, in a case where the plaintiff, at the solicitation of an agent signed an application for a policy, wherein it was provided that the policy should take effect from the day the application was approved and gave his note for the premium. The agent gave a receipt for the note, at the same time promising plaintiff that the policy would take effect from the date of the application. The application was sent to the principal office and was rejected; but, before the agent had informed plaintiff of the failure of the negotiations the property proposed to be insured was destroyed by fire. It was held that there was no valid contract of insurance.<sup>100</sup>

**§ 62. Completion of Contract—Negotiations Through Mail.**—Negotiations are frequently carried on by mail, and some question has arisen as to what constitutes an acceptance in such cases. If the application and premium be mailed, and they are never received nor heard of by the company, no contract exists even though a receipt is given by the company.<sup>101</sup> In the well-known case of *McCulloch v. The Eagle Insurance Company*<sup>102</sup> a letter was written inquiring on what terms the company would take a risk for a stated amount on a certain brig and cargo between specified termini. The company replied stating the terms, and on the same day the answer was received the party wrote requesting a policy on the terms specified. The day before this letter of acceptance was mailed the company had written refusing the risk, which, however, was not received at the time of mailing the letter of acceptance. All the letters were duly received in regular course of mail by both parties. Upon a loss and action brought for recovery thereof the court held that there was no completed contract. In a later case, however, in the same state<sup>103</sup> it was declared by the court in argument that a "notice actually put into the mail, especially if forwarded and beyond the control or revocation

<sup>100</sup> *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; 5 Am. Rep. 64.

<sup>101</sup> *Atkinson v. Hawkeye Ins. Co.*, 71 Iowa, 340; 32 N. W. Rep. 371.

<sup>102</sup> 1 Pick. (Mass.) 277.

<sup>103</sup> *Thayer v. Middlesex Mut. F. Ins. Co.*, 10 Pick. (Mass.) 326, 331.

of the party sending it, may be a good notice."<sup>104</sup> In view of the *McCulloch v. Eagle Insurance Company* case, we will state that a locus poenitentiae exists so long as either party may withdraw. But the rule clearly is, that the mailing a letter of acceptance in like cases completes the contract, as the locus poenitentiae is ended when the acceptance has passed beyond the control of the party, notwithstanding before that the company may have mailed another letter rejecting the risk, unless such notice has reached the insured before his acceptance had been mailed.<sup>105</sup> And if the acceptance is made by the deposit of a policy in the mail, the contract is consummated, for the company thereby does an overt act which signifies that the policy should have present vitality.<sup>106</sup> So in a case in the United States circuit court a life insurance, upon due application, was issued under a contract with the local agent, whereby it was substantially agreed that the agent should pay the first

<sup>104</sup> See, also, 1 Duer on Insurance, ed. 1845, 121. Mr. Phillips (1 Phillips on Insurance, 3d ed., p. 18, sec. 17) says: "The doctrine decidedly predominating in the cases, accordingly, is that a written offer by insurers of terms on which they will insure where the subject risks and terms are adequately specified, becomes binding on dispatch of an acceptance, provided the acceptance reaches them before being countermanded, and in reasonable time, or within the time prescribed."

<sup>105</sup> 1 Wood's Fire Insurance, 2d ed., 40, sec. 15, et seq., and notes; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339; *Hallock v. Insurance Co.*, 26 N. J. L. 268; 27 N. J. L. 645; *Eliason v. Hurshaw*, 4 Wheat. (U. S.) 228; *Adams v. Lindell*, 1 Barn. & Ald. 681; *Taylor v. Merchants' Ins. Co.*, 9 How. (U. S.) 390; *Lunstrass v. German Ins. Co.*, 48 Mo. 201, 204; 8 Am. Rep. 100; *Mactier, Admr. v. Frith*, 6 Wend. (N. Y.) 103; 21 Am. Dec. 262. As to the general rule in other contracts that the acceptance takes effect from the mailing of the letter of acceptance and a retraction from the receipt of the letter, see *Abbott v. Shepherd*, 48 N. H. 14; *Stockham v. Stockham*, 32 Md. 196; *Ferrier v. Storer*, 63 Iowa, 484; *Wheat v. Cross*, 31 Md. 99; 1 Am. Rep. 28; *Washburn v. Fletcher*, 42 Wis. 152; *Potts v. Whitehead*, 20 N. J. 55; *Bryan v. Booze*, 55 Ga. 438; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Greer v. Chartiers R. R. Co.*, 93 Pa. St. 391; 42 Am. Rep. 548; *Duncan v. Topham*, 8 Com. B. 225; 2 Kent's Commentaries, 13th ed., 477.

<sup>106</sup> *Oliver v. American L. of H.* (Cal. 1882), 17 Am. L. Rev. 301; *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645; 26 N. J. L. 268; 7 Am. Dec. 379; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; 21 Am. Dec. 262; 2 Kent's Commentaries, 13th ed., 477; *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390; *Vassar v. Camp*, 11 N. Y. 441. See *Eames v. Home Ins. Co.*, 94 U. S. 621.

quarter's premium and take the applicant's note for the same, and the policy was mailed from the home office July 28, 1885, and received by the local agent August 5, 1885, but was never actually delivered into the possession of the applicant, who was taken ill August 6th, and died September 9, 1885, and it was held that as between the applicant and the company the policy became effective and binding when placed in the mail July 28, 1885, and if not then, certainly when it reached the hands of the agent, August 5, 1885.<sup>107</sup> So, also, where an accident policy was sent by mail but did not reach its destination until after the death of assured, it was held that the contract was complete when the policy was deposited in the mail and credit given for the premium.<sup>108</sup> And where a policy insuring against loss by boiler explosion was deposited in the mail, together with the report of the company's boiler inspector and suggestions as to changes in the setting of the boiler, it was held that the contract was complete and that compliance with the suggestions was not a condition precedent to the completion of the contract.<sup>109</sup>

**§ 63. No Contract where Acceptance Mailed Differs in Terms from Proposal.**—If the policy sent by mail is not an acceptance of the terms proposed, but is in different terms, there is no contract, as the minds of the parties never met, although the insurers answer that they accept the terms proposed.<sup>110</sup> So if the correspondence shows that the minds of the parties never met upon the terms, mailing a policy which the applicant is not bound to accept does not bind the company.<sup>111</sup> In a Connecticut case, one C. signed an application for life insurance, and submitted to a medical examination under an agreement that the policy, when issued, should be forwarded by mail

<sup>107</sup> *Young v. Equitable L. Ins. Co.*, 30 Fed. Rep. 902.

<sup>108</sup> *Dailey v. Masonic Mut. Acc. Assn.* 102 Mich. 289; 57 N. W. Rep. 184. Reversed upon other points on rehearing, 102 Mich. 299.

<sup>109</sup> *Hartford etc. Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439; 29 Atl. Rep. 629.

<sup>110</sup> *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *Duncan v. Topham*, 8 Com. B. 225.

<sup>111</sup> *Hamblet v. City Ins. Co.*, 36 Fed. Rep. 118; *Piedmont etc. Ins. Co. v. Ewing*, 92 U. S. 377.



to C.'s address in New York, who, if it was found to be as agreed, was to send the premium, or if not, to return the policy; the policy to take effect when the premium was paid. Afterward, the agent mailed it to C. at New York, the envelope being marked "return in ten days if not called for." It was returned uncalled for. The agent then sent the policy to another place where he supposed C. might be, but C. had died two days before it was sent. It was held to be an inchoate and not a complete contract of insurance, and that no liability attached under it.<sup>112</sup> But where an agent sent a policy by mail to an applicant, with a statement that the premium charged was higher than usual, and requesting a return of the policy by mail should he decline it, or if retained, to send the premium, it was held that retaining the policy was an acceptance, or, at all events, the question was one for the jury.<sup>113</sup>

**§ 64. Agent's Receipt Pending Approval or Issuance of Policy.**—To what extent a company is bound by a receipt given by an agent pending an approval by the company or until the policy is issued depends greatly upon the agent's authority and the particular circumstances of each case, and for these reasons the decisions are not perfectly in accord. The following general rules will, however, be found to be in conformity with the law as laid down by the adjudicated cases: 1. If the act of acceptance of the risk by the agent and the giving by him of a receipt is within the scope of the agent's authority, and nothing remains but to issue a policy, then the receipt will bind the company;<sup>114</sup> 2. Where an agreement is made between the applicant and the agent whether by signing an application containing such condition, or otherwise, that no liability shall attach until the principal approves the risk and a receipt is given by the agent, such acceptance is merely conditional, and is subordinated to the act of the company in approving or rejecting;<sup>115</sup> 3. Where the acceptance by the agent is within the scope of his authority, a receipt containing

<sup>112</sup> *Rogers v. Charter Oak L. Ins. Co.*, 41 Conn. 97.

<sup>113</sup> *Sheldon v. Atlantic etc. Ins. Co.*, 26 N. Y. 460; 84 Am. Dec. 213.

<sup>114</sup> *Fish v. Cottenet*, 44 N. Y. 538; sec. 57, herein, and cases.

<sup>115</sup> See sec. 57, herein, and cases.

a contract for insurance for a specified time which is not absolute but conditional, upon acceptance or rejection by the principal, covers the specified period, unless the risk is declined within that time,<sup>116</sup> and it has been held in these cases that the company may not arbitrarily reject after a loss.<sup>117</sup> In connection with the above rules the following decisions are important: Where an agent gave a binding receipt pending the company's approval and told the applicant that the risk had been accepted, and the evidence of the agent showed that it had in fact been accepted, the contract was held good after loss, and the company estopped to deny acceptance,<sup>118</sup> and it is also held where the agent gave a receipt for certain money intended as part payment of premium and duty, under an agreement of insurance for one month, or unless rejected by the company before the expiration of the month, and the property was burned before a policy was issued, that giving the receipt completed the contract, unless rejected by the principal,<sup>119</sup> and the company will be bound where a local insurance agent authorized to deliver "binding receipts," signed by the general agent, agrees in good faith and for value to assume the payment to the company of the first cash installment, and delivers to the insured a "binding receipt" properly signed.<sup>120</sup> But it is held that it is competent for the agent to explain what was understood between the parties by the words, "this receipt being binding," etc., where the receipt was signed by the agent and read as follows: "Received of S. three hundred and seventy-five dollars in payment of insurance in the C. S. Insurance Company, this receipt being binding, on said company until policy is received."<sup>121</sup> In another case A. applied to an agent for insurance on certain property, and the terms were agreed upon and

<sup>116</sup> *Goodfellow v. Times & Beacon Assur. Co.*, 17 U. C. Q. B. 411.

<sup>117</sup> *Fish v. Cottenet*, 44 N. Y. 538; *Palm v. Medina Ins. Co.*, 20 Ohio, 529.

<sup>118</sup> *Penley v. Beacon Ins. Co.*, 7 Grant U. C. 130.

<sup>119</sup> *Mackie v. European Ins. Co.*, 21 L. T., N. S., 102. See *Barr v. North American Ins. Co.*, 61 Ind. 488.

<sup>120</sup> *Mississippi Val. L. Ins. Co. v. Neyland*, 9 Bush (Ky.), 430. But see *Todd v. Piedmont etc. Ins. Co.*, 34 La. Ann. 63.

<sup>121</sup> *Scurry v. Cotton States L. Ins. Co.*, 51 Ga. 624.

receive proposal of insurance," in the "binding book," to continue in force until the premises, the risk being specially hazardous, should be inspected by a special agent, and the property was burned before the policy issued, the company was bound thereby;<sup>130</sup> and where the agent entered the amount upon his register the terms being agreed upon and the premium received by the agent, the contract was held valid.<sup>131</sup> So an indorsement on an application for reinsurance that the risk is taken will be binding.<sup>132</sup> So the company may be bound by a certificate given by the secretary of an insurance company to an applicant consenting that a policy already issued to him might cover property not included therein.<sup>133</sup> In *Thompson v. Adams*<sup>134</sup> the plaintiffs in New Zealand instructed their representatives to obtain insurance for them upon certain goods in New Zealand. Their representatives communicated with a firm of brokers who undertook to effect insurance for twenty thousand pounds. Insurance had been effected in the same way before. The insurance brokers communicated with another broker, B., entitled to effect insurances at Lloyds. B., as was customary, prepared a slip showing the particulars as in case of a marine risk; this risk was shown to the defendant, who initialed the slip. Ordinarily, this slip was followed with a policy. This slip was initialed October, 1886, but no policy was tendered for signature until February following, and on the 28th of that month news came that the premises and goods were destroyed by fire, but no policy had been issued nor premium tendered. Premiums were afterward tendered but defendant refused to accept them or to sign the policy. It was held that the slip was a binding contract to insure and enforceable.

**§ 66. Completion of Contract—Marine and Fire—Binding Slip.**—In marine insurance in England the usual course of business is for the broker to prepare a slip containing

<sup>130</sup> *Putnam v. Home Ins. Co.*, 123 Mass. 324; 25 Am. Rep. 93.

<sup>131</sup> *Ellis v. Albany F. Ins. Co.*, 50 N. Y. 402; 10 Am. Rep. 495.

<sup>132</sup> *Woodruff v. Columbus Ins. Co.*, 5 La. Ann. 697.

<sup>133</sup> *Goodall v. New England F. Ins. Co.*, 25 N. H. 169.

<sup>134</sup> L. R. 23 Q. B. D. 361. See next section.

the particulars of the proposed insurance, and showing the risk. This slip is presented to the underwriters, and, if the risk is accepted, is initialed successively by them for the sum agreed to be taken by each underwriter. Within about the last ten years fire risks have been underwritten at Lloyds, the same course being pursued as in marine risks, and when the slip has been completely initialed the policy is prepared by the broker and submitted to the successive underwriters, and when they have signed the policy the contract is complete in all formal particulars, and an interval must elapse between initialing the slip and the date of the policy, which frequently runs into weeks and months. There is, however, in the English cases one essential and marked difference between the legal effect of the initialed slip in marine and fire policies, and this distinction is brought about clearly by force of the act of 1867, 30 Victoria, chapter 23, sections 7, 9. In marine risks the slip is, in practice and in accordance with a long-existing course of business, and the understanding of those engaged in marine insurance, the complete and final contract between the parties fixing the terms of the insurance and the premium, and is obligatory upon both parties. At least this is its effect as an honorary engagement, but under the legislative enactment above referred to requiring contracts and agreements for sea insurance to be expressed in a policy, and precluding the pleading or the admission in evidence of a policy not duly stamped, such slip is not a valid obligation, binding either in law or equity upon the insurers, in case they should seek to evade the honorary contract evidenced by the initialed slip, for the policy is the only legal evidence of the contract. On the contrary, in case a slip is initialed for a fire risk, there is no statutory difficulty in the way. A slip filled out and presented for fire insurance at Lloyds and initialed, is a binding legal contract to effect a subsequent insurance, and not merely an honorary undertaking. If the policy is put forward within a reasonable time the underwriter is obligated to subscribe, and during the interval between the slip and the policy he is legally bound, and the insured is liable for the premium. We deduce the distinction here made between the effect of the slip in marine and fire risks from the words of the statute and the cases cited below,

and such is evidently the law of the present day in England.<sup>135</sup> But it is said that in case of an unstamped agreement to insure, the premium having been paid, a court of equity would compel the issuance of a policy,<sup>136</sup> although the statute above referred to would seem to exclude even this proposition.<sup>137</sup> In this country, however, when a slip, application, or order for insurance is actually accepted, the terms being agreed upon and the contract otherwise complete except the issuance of the policy, whether the entry be made in the books of the company properly subscribed by an authorized agent, or the acceptance be otherwise evidenced, there would seem to be no valid reason why in the absence of a statutory or perhaps some charter prohibition there is not a valid enforceable contract of insurance, even though the policy is not issued, and such is evidently the law.<sup>138</sup> We may state here that in this country the general principles underlying and governing the completion and validity of contracts of insurance are equally applicable to cases of marine and fire contracts as in other cases, and those principles are set forth fully under this chapter. But upon the question whether the slip on application for a policy of insurance is admissible in evidence to show the intention of the parties to the policy a different question is presented; and although it is held not admissible in a court of law upon the general grounds that all prior negotiations are merged in the written contract, yet if the policy does not conform to the agreement contained in the slip, it might be admissible to show a mistake in a court of equity or in a court exercising equitable jurisdic-

<sup>135</sup> *Fisher v. Liverpool M. Ins. Co.*, L. R. 8 Q. B. 469; L. R. 9 Q. B. 418; 43 L. J. Q. B. 114; *In re London Mut. Ins. Co. (Smith's case)*, 4 L. R. Ch. 611; *Thompson v. Adams*, L. R. 23 Q. B. D. 361; noted as last case under preceding section; *Ionides v. Pacific F. etc. Ins. Co.*, L. R. 6 Q. B. 674; *Arnould on Marine Insurance*, Perkins' ed. 1850, 13, \*13, 14.

<sup>136</sup> *Mead v. Davidson*, 3 Ad. & E. 303, 308.

<sup>137</sup> *Fisher v. Liverpool M. Ins. Co.*, L. R. 8 Q. B. 469; L. R. 9 Q. B. 418; 43 L. J. Q. B. 114.

<sup>138</sup> *Woodruff v. Columbus Ins. Co.*, 5 La. Ann. 697; *Loring v. Proctor*, 28 Me. 18; *Neville v. M. M. Ins. Co.*, 17 Ohio, 192; *Blanchard v. Waite*, 28 Me. 51; *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402; *Warren v. Ocean Ins. Co.*, 16 Me. 439; *Wass v. Maine Mut. M. Ins. Co.*, 61 Me. 587; *Marx v. National etc. Ins. Co.*, 25 La. Ann. 39.

tion over the case, or even in a law court under certain circumstances.<sup>139</sup> An application for a policy may be validly drawn up in lead pencil.<sup>140</sup>

*SUBDIV. III. Completion of Contract: Prepayment of Premium.*

§ 70. **Prepayment of Premium Condition Precedent.** Where it is expressly provided that the policy shall not take effect until the premium is paid, there is no binding contract until such payment is made.<sup>141</sup> So where there is a special understanding between an insurance office and the agent of the insured that no insurance shall be considered as effected in behalf of himself or others until the premium is paid, and a rule of the company is kept posted up in the office not to consider an insurance effected until the premium is paid, the policy delivered, or a written acceptance entered on the books, no agreement for insurance can be perfected in equity when these conditions are not complied with.<sup>142</sup> So, also, where a policy is issued subject to the conditions on the back thereof, and one of the conditions is that the contract is not valid unless the premium is actually "paid in cash," and there is no waiver of this provision by the company, and the agent issuing the policy has no authority to alter these provisions, it is held that the acceptance of a promissory note of the insured by the agent as payment of the premium does not render the contract complete, and that there is no consideration for the note.<sup>143</sup> And

<sup>139</sup> *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige (N. Y.), 278; *Motteux v. London Assur. Co.*, 1 Atk. 545; *Dow v. Whetten*, 8 Wend. (N. Y.) 168; *Delaware Ins. Co. v. Hogan*, 2 Wash. (C. C.) 4.

<sup>140</sup> *City Ins. Co. v. Bulker*, 91 Pa. St. 488.

<sup>141</sup> *Schwartz v. Germania Ins. Co.*, 18 Minn. 448; *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.), 320; *Mulrey v. Shawmut etc. Ins. Co.*, 4 Allen (Mass.) 116; 81 Am. Dec. 689; *Sandford v. Trust Ins. Co.*, 11 Paige (N. Y.), 547; *Flint v. Ohio Ins. Co.*, 8 Ohio, 502; *Bergesen v. Builders' Ins. Co.*, 38 Cal. 541; *Home Ins. Co. v. Field*, 42 Ill. App. 392. A condition in a fire policy issued in Iowa, providing "that no insurance, whether original or continued, shall be considered as binding until the actual payment of the premiums, nor shall this company be liable for any loss under this policy occurring when any note, or any part thereof, given for a part or whole of the premium, shall be due and unpaid," is valid: *Harle v. Council Bluffs Ins. Co.*, 71 Iowa, 401; 32 N. W. Rep. 396.

<sup>142</sup> *Flint v. Ohio Ins. Co.*, 8 Ohio, 502.

<sup>143</sup> *Dunham v. Morse*, 158 Mass. 132; 32 N. E. Rep. 1116.

where the application for a life policy provides that there shall be no contract until the policy is issued and delivered and the first premium paid during the life of the applicant while in the same condition of health as described in the application, and the applicant dies before the policy is issued, the contract is not complete.<sup>144</sup> So a policy of insurance issued on the express condition that the assured shall execute his negotiable promissory note to the company with a solvent indorser is of no binding force until the condition has been performed.<sup>145</sup> In *Giddings v. Northwestern Mutual Life Insurance Company*<sup>146</sup> an application was made by B. to the agent of a mutual life insurance company for a policy upon his life for six thousand dollars; the application was upon a form furnished by the agent. The charter of the company provided that before a person could become a member, he should "the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees." A policy was issued and forwarded to the agent, which provided that it should not be binding on the company until "the premium be actually paid, during the lifetime of the person whose life is assured, to the company, or some person authorized to receive it, who shall countersign the policy on receipt of the premium." The policy was not called for, but was returned and canceled. B. died prior to the return of the policy, and the administrator tendered the first premium to the agent, who refused to act in the matter. Thereupon, the administrator forwarded proofs of loss to the company, action was subsequently brought, and the court decided that the payment of the premium in the lifetime of B. was a condition precedent to A.'s liability, and the suit could not be maintained. In another case the policy expressly provided that the company should not be liable until the premium in full was actually paid, and that if the premium was not paid within fifteen days from the date of the policy, it should be null and void. Before the premium was paid, and before the expiration of the "fifteen days," the property was burned. Thereupon the insured within the

<sup>144</sup> *Paine v. Pacific Mut. L. Ins. Co.*, 51 Fed. Rep. 689.

<sup>145</sup> *Bidwell v. St. Louis etc. Ins. Co.*, 40 Mo. 42.

<sup>146</sup> 102 U. S. 103.

"fifteen days" tendered the premium and claimed indemnity for the loss. The court, however, determined that actual payment of the premium, not only within the "fifteen days" but before loss, was necessary to render the company liable under the policy, and that the holder could not recover.<sup>147</sup> And where a party seeking insurance on his life has made some effort to pay the premium necessary to perfect the contract, but not done all that he could, the company is not liable;<sup>148</sup> and such stipulation as to prepayment of premium is not complied with or waived by a payment of the premium to an insurance agent, through whom the application was made and the policy delivered, if the policy contains an express stipulation that every insurance agent, broker, or other person forwarding applications or receiving premiums is the agent of the applicant and not of the company, although the company were in the habit of settling a monthly account with him, and he, after the loss, tendered the premium to them.<sup>149</sup> It is also held in a North Carolina case that if the prepayment of dues is stipulated for in the application, it constitutes an essential part of the contract of insurance, with which the agent has no power to dispense even if an intent to do so can be inferred from his forwarding the policy with a receipt for the dues signed by the president, but not countersigned by him.<sup>150</sup> In *Hubbard v. Pacific Mutual Insurance Company*<sup>151</sup> the defendant agreed to insure plaintiff's cargo. The custom in such cases was to issue a policy in from ten to twenty days on payment of the premium or delivery of the note of the insured therefor. Within twenty days plaintiff became insolvent, and made an assignment. Defendant gave notice that the premium must be paid in cash or secured. Nothing more was done. Several years afterward, in a suit brought on the agreement, it was held that the agreement came to an end by the failure of plain-

<sup>147</sup> *Bradley v. Potomac F. Ins. Co.*, 32 Md. 108; 3 Am. Rep. 121. See *Home Ins. Co. v. Field*, 42 Ill. App. 392.

<sup>148</sup> *Cronkhite v. Accident Ins. Co. of North America*, 35 Fed. Rep. 26.

<sup>149</sup> *Mulrey v. Shawmut etc. Ins. Co.*, 4 Allen (Mass.), 116; 81 Am. Dec. 689. See *Wallingford v. Home etc. Ins. Co.*, 30 Mo. 46.

<sup>150</sup> *Ormond v. Fidelity L. Assn.*, 96 N. C. 158; 1 S. E. Rep. 796.

<sup>151</sup> 100 N. Y. 40.



tiff to comply with defendant's notice or to take some action at the time. In *Buffum v. Fayette etc. Insurance Company*,<sup>152</sup> it was determined that if the by-laws of a mutual insurance company provide that "each person, before the policy shall be binding on the company, shall pay to the treasurer or agent such premium and make such deposit as the directors shall determine," the company is not rendered liable on a policy which is executed, but not delivered, and for which no premium has been paid, by an oral promise of their treasurer to the applicant for insurance that if anything should happen, he would see the premium paid, or that he would take it upon himself to keep the policies good. In another case an application for life insurance was made to an insurance company which it found satisfactory; and it wrote a policy based on the application and sent the policy to its agent, who offered the policy to the person making the application for inspection. The premium called for by the terms of the policy was not paid, and the policy was not delivered, and it was decided that an action could not be maintained against the company under any form of declaration.<sup>153</sup> And if a policy of insurance is sent to the assured, and he refuses to accept it and pay the premium according to its terms and his agreement, but holds it to look into the standing of the company while it is under advisement, without delivery, acceptance, and payment of the premium, the property is at the risk of the assured, and he cannot recover in case of loss by fire. It is too late to accept the policy and tender the premium after the property is destroyed, where the policy requires prepayment and there has been no waiver.<sup>154</sup>

**§ 71. Actual Prepayment of Premium not in all Cases Essential to Validity of Contract.**—The payment of the premium is not made a condition precedent to the taking effect of a contract of insurance by a writing following the proposals, but not made a part of the policy, either by recital or reference, stating that the applicant agrees "that the assurance hereby

<sup>152</sup> 3 Allen (Mass.), 360.

<sup>153</sup> *Markey v. Mutual B. Ins. Co.*, 126 Mass. 158. See, also, *Home Ins. Co. v. Field*, 42 Ill. App. 392.

<sup>154</sup> *Millville Mutual etc. Ins. Co. v. Collierd*, 38 N. J. L. 480.

proposed shall not be binding on said company until the amount of premium as stated therein shall be received by said company or an accredited agent.”<sup>155</sup> And in *Stanley v. Northwestern Life Association*<sup>156</sup> a member agreed in his application to pay “one assessment” within thirty days from its date, when made as conditioned in the by-laws. The by-laws provided that a member failing to pay his assessment within thirty days from its date should stand suspended, and the court decided that by failure to pay any one assessment within the time prescribed the certificate would lapse, but the payment of at least one assessment was not a condition precedent to recovery.<sup>157</sup>

**§ 72. Prepayment of Premium—Oral Agreement.—**  
In the case of an oral contract for insurance the prepayment of the premium is not necessary,<sup>158</sup> until the policy issues, unless there is a special agreement to the contrary, but when the policy is tendered, the insured must pay the premium, unless credit is given or there is an express or implied waiver or some agreement obviating the necessity of prepayment;<sup>159</sup> nor is it essential to the existence of a binding contract to make insurance that the premium note should have been actually signed and delivered.<sup>160</sup> If an oral agreement for insurance is made, and prepayment is not made a condition precedent, there is no obligation to pay the premium until the policy is ready for delivery.<sup>161</sup>

<sup>155</sup> *Sheldon v. Connecticut Mut. L. Ins. Co.*, 25 Conn. 207; 65 Am. Dec. 565.

<sup>156</sup> 36 Fed. Rep. 75.

<sup>157</sup> See note to 21 Am. St. Rep. 883. See sections next following.

<sup>158</sup> Oral agreement—case where the agent received and remitted the premium: *Ellis v. Albany etc. Ins. Co.*, 4 Lans. (N. Y.) 433; 50 N. Y. 402; 10 Am. Rep. 495.

<sup>159</sup> *Davenport v. Peoria etc. Ins. Co.*, 17 Iowa, 276; *Kohne v. Insurance Co. of North America*, 1 Wash. (C. C.) 93; *Kelly v. Commonwealth Ins. Co.*, 10 Bosw. (N. Y.) 82; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216, 223, *Denio, J.*; *Loring v. Proctor*, 26 Me. 18; *N. E. Ins. Co. v. Robinson*, 25 Ind. 536.

<sup>160</sup> *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. (U. S.) 318.

<sup>161</sup> *Croft v. Hanover F. Ins. Co.* (W. Va. 1895), 21 S. E. Rep. 854.

§ 73. **Prepayment of Premium to Agent or Broker.**—The payment of the premium to a company's authorized agent binds the company though the agent convert the money and a policy is never actually issued.<sup>162</sup> But an agent authorized to deliver the policy and receive and transmit premiums, but not to issue policies, may not extend the time for payment.<sup>163</sup> It is no defense, however, that the company never received the money from the agent who delivered the policy, he having authority to deliver it,<sup>164</sup> and if the assured pays the premium to an insurance broker and receives the policy, he does not lose the benefit thereof by reason of a course of dealing between the broker and the general agent of the company.<sup>165</sup> A policy was executed and attested as required by the act incorporating the company. It contained no stipulation making an actual payment of the premium a condition precedent, or that default in its payment should constitute a forfeiture. The policy was delivered without prepayment to an agent for the purpose of being delivered to the plaintiff. The plaintiff paid the premium to the agent and the stock insured was destroyed by fire. It was held that the company was liable.<sup>166</sup> An insurance company will not be permitted to refuse a risk on the ground of a loss prior to the receipt of the premium if the premium was paid to an agent of the company prior to the loss and would have been received but for the delay of the agent.<sup>167</sup> It is held in Illinois that payment of the premium to the local agent and a return thereof to the general agent, by whom the amount is credited to the local agent on the books of the company, and an instruction afterward to the local agent to cancel the policy, is an admission that there was a policy capable of being canceled, and it is not for the company afterward to

<sup>162</sup> *Idé v. Phoenix Ins. Co.*, 2 Biss. (C. C.) 333. See *Firebee v. N. O. etc. Ins. Co.*, 68 N. C. 11.

<sup>163</sup> *Critchett v. American Ins. Co.*, 53 Iowa, 495.

<sup>164</sup> *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149.

<sup>165</sup> *Pittsburgh B. Co. v. Western Assur. Co.*, 5 Pa. 119; 10 Cent. Rep. 817.

<sup>166</sup> *Pennsylvania Ins. Co. v. Carter*, 11 Atl. Rep. 102.

<sup>167</sup> *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645.

deny it.<sup>168</sup> When the policy provides that the insurance broker should be deemed the agent of the insured, the payment of the premium to him does not constitute a payment to the company.<sup>169</sup> But where a policy is delivered to an agent with authority to deliver it to the insured and receive the premium, and the agent delivers the policy and accepts a note for the premium, and discounts it on his own account, but does not pay the amount to the principal, the company is liable, although the policy provides that such agent shall be deemed the agent of the insured, and that the insurer shall not be liable until he actually receives the premium.<sup>170</sup> In a Pennsylvania case the policy provided for actual cash payment into the office before the policy should attach and payment was made to an insurance broker to whom the application was made, but the money was not paid into the office of the company. The court held that he was agent of the applicant, and that the company was not liable.<sup>171</sup> The decisions, however, are not unanimous upon the question whether the agent or broker is agent of the insurer or insured in certain cases. This point, however, will be considered hereafter.<sup>172</sup>

**§ 74. Effect of Part Payment.**—Where prepayment is a condition precedent to the validity of the policy, a part pay-

<sup>168</sup> *Etna Ins. Co. v. Maguire*, 51 Ill. 342.

<sup>169</sup> *Wilbar v. Williamsburg City F. Ins. Co.*, 122 N. Y. 439; 15 N. Y. 802; *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47; 20 Am. Rep. 451; *Pottsville Mut. Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137.

<sup>170</sup> *Carson v. Jersey City F. Ins. Co.*, 43 N. J. L. 300; s. c. 39 Am. Rep. 584. See *Alexander v. Germania F. Ins. Co.*, 66 N. Y. 464; 23 Am. Rep. 76.

<sup>171</sup> *Pottsville Mut. Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137.

<sup>172</sup> It is held in a case in Indiana that the broker is the agent of the one from whom he receives compensation, irrespective of who employs him: *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177; 24 N. E. Rep. 100; see *Mullin v. Vermont Mut. F. Ins. Co.*, 58 Vt. 113. In another case that he is agent for both parties: *Crousillat v. Ball*, 3 Yeates, 375; 4 Dall. (C. C.) 294; 2 Am. Dec. 375. In another case that he is agent of the person employing him: *Hamblett v. City Ins. Co.*, 36 Fed. Rep. 118. And in another case that he may be shown to be the company's agent: *Newark F. Ins. Co. v. Samons*, 110 Ill. 166. See chapters on agents herein.

ment of the premium, unless the balance is credited, is not sufficient to bind the company<sup>173</sup> unless the company assents thereto and receives the part payment,<sup>174</sup> although where there is an application, or payment of a portion of the premium, and acceptance of the risk by the company, and nothing is required but the delivery of the policy and the payment of the balance of the premium, which latter is not required under the rules of the company until the contract is completed, a valid contract for a policy exists.<sup>175</sup>

**§ 75. Payment by Third Person.**—Where a policy of life insurance provides that it shall not take effect until the payment of the advance premium has been made during the lifetime of the insured, a payment with the applicant's money made by a third party but without his knowledge, although during his lifetime, cannot be ratified by his administrator after his death, and is inoperative.<sup>176</sup> Where an applicant for life insurance had an interview with an agent of the company, who offered a policy to him and asked him to pay the premium, and he told the agent that if he would go to a third party that the latter would pay him, as an arrangement had been made with him to that effect, and the agent agreed to go, but never went, and retained the policy in his own hands: it was held that instructions were erroneous which permitted the jury to find that these facts were equivalent to a delivery of the policy and payment of the premium.<sup>177</sup>

**§ 76. Prepayment of Premium may be Waived.**—It is well-settled law that the clause in a policy exempting the company from liability until actual payment of the premium may

<sup>173</sup> *Barnes v. Piedmont etc. F. Ins. Co.*, 74 N. C. 22.

<sup>174</sup> *Brown v. Massachusetts Mut. L. Ins. Co.*, 59 N. H. 298, 307; 47 Am. Rep. 205.

<sup>175</sup> *Cooper v. Pacific Mut. L. Ins. Co.*, 7 Nev. 116; 8 Am. Rep. 705.

<sup>176</sup> *Whiting v. Massachusetts Mut. L. Ins. Co.*, 129 Mass. 240; s. c. 37 Am. Rep. 317. But see *Mississippi Valley L. Ins. Co. v. Neyland*, 9 Bush (Ky.), 430. See as to payment of premiums in marine insurance: *Hurlburt v. Pacific Ins. Co.*, 2 Sum. (C. C.) 471; *Patapsco Ins. Co. v. Smith*, 6 Har. & J. (Md.) 166; 14 Am. Dec. 268; *Insurance Co. v. Smith*, 3 Whart. (Pa.) 520.

<sup>177</sup> *Hoyt v. Mutual B. L. Ins. Co.*, 98 Mass. 539.

be waived by the company or its authorized agent, and the contract become binding without prepayment of the premium, such provisions being for the benefit of the company,<sup>178</sup> and prepayment of the premium may be waived though the policy provides that the premium must be prepaid either at the company's office or to an agent duly authorized in writing to receive it.<sup>179</sup> Such waiver may be established by evidence of a parol agreement to that effect,<sup>180</sup> or it may be inferred from circumstances showing that prepayment was not intended to be insisted upon.<sup>181</sup> So a statement that the payment of the money makes "no difference" is a waiver,<sup>182</sup> and where the premium was not paid at the time of application, but after the loss and on delivery of the policy, the insured not mentioning the loss, it was held that the question of waiver of immediate payment was one of fact for the jury.<sup>183</sup> It is held in Louisiana, where an application for insurance is accepted, the policy made out in duplicate, and the name of the assured as such is entered on the company's books, the contract is complete, and unless the company have required payment of the premium at that time, or notified the applicant of a stipulation in the policy requiring payment of the premium as a condition precedent, the company will be deemed to have waived such condition;<sup>184</sup> and proof of such a waiver is no violation of the rule prohibiting parol evidence to vary or contradict a written contract.<sup>185</sup>

<sup>178</sup> *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598, 602; *Trustees etc. v. Brooklyn Ins. Co.*, 19 N. Y. 305; *Wood v. P. Ins. Co.*, 32 N. Y. 619; *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566.

<sup>179</sup> *Universal F. Ins. Co. v. Block*, 109 Pa. St. 535; *Susquehanna Mut. F. Ins. Co. v. Elkins*, 124 Pa. St. 484; 17 Atl. Rep. 24.

<sup>180</sup> *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566; *Goit v. National Prot. Ins. Co.*, 25 Barb. (N. Y.) 189.

<sup>181</sup> *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566; *Goit v. National Prot. Ins. Co.*, 25 Barb. (N. Y.) 189; *Heaton v. Manhattan F. Ins. Co.*, 7 R. I. 502; *Equitable Ins. Co. v. McCrea*, 76 Tenn. 541; *Whitwell v. Putnam F. Ins. Co.*, 6 Lans. (N. Y.) 166, 168; *Thompson v. St. Louis Mut. L. Ins. Co.*, 52 Mo. 469.

<sup>182</sup> *Bragdon v. Appleton Mut. Ins. Co.*, 42 Mo. 259.

<sup>183</sup> *Baldwin v. Chouteau Ins. Co.*, 56 Mo. 151; 17 Am. Rep. 671.

<sup>184</sup> *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214; 92 Am. Dec. 529.

<sup>185</sup> *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214; 92 Am. Dec. 529.

Although a policy in a mutual insurance company stipulates that it shall be void if any assessment on the premium note shall not be paid within thirty days, yet it may lawfully impose a second assessment where the first one is not paid within the time limited.<sup>186</sup> But the acceptance of a note for the premium constitutes a waiver of a condition requiring prepayment, although the policy may be canceled after the maturity and non-payment of the note if reasonable notice is given, and this may be done without either tendering or crediting that part of the premium which is unearned, as the credit may be adjusted, no matter into whose hands the note may fall.<sup>187</sup>

§ 77. **Waiver of Prepayment by Agent.**—A general agent of an insurance company who has authority to deliver policies and receive payment of the premium has power to waive prepayment of the premium although the policy contains a condition to the contrary.<sup>188</sup> Where the agent of the insurers was told that the money was ready for him in the bank, and the agent told assured to let it lie, and when he wanted it he would draw for it, and he drew for it after the fire, this was held to constitute a sufficient waiver,<sup>189</sup> and a general agent may waive prepayment of the premium although the policy provides not only that the insurer shall “not be liable until actual payment of the premium,” but also that no officer or agent shall “be held to have waived any of the terms and conditions of the

<sup>186</sup> *Columbia Ins. Co. v. Buckley*, 83 Pa. St. 293; 24 Am. Rep. 172.

<sup>187</sup> *Little v. Charter Oak L. Ins. Co.*, 38 Ohio St. 110.

<sup>188</sup> *Home Ins. Co. v. Gilman*, 112 Ind. 7; *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun (N. Y.), 91; *Sheldon v. Atlantic etc. Ins. Co.*, 26 N. Y. 460; 84 Am. Dec. 213; *Boehen v. Williamsburg C. Ins. Co.*, 35 N. Y. 131; 90 Am. Dec. 787; *Miller v. Life Ins. Co.*, 12 Wall. (U. S.) 285; *Newark Mach. Co. v. Kenton Ins. Co.* (Ohio, 1894), 35 N. E. Rep. 1060; 31 Week. L. Bull. 51. See *Ball & Sage Wagon Co. v. Aurora etc. Ins. Co.*, 20 Fed. Rep. 232; *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214; 92 Am. Dec. 529; *O'Brien v. Union Mut. L. Ins. Co.*, 22 Fed. Rep. 586; *Critchett v. American Ins. Co.*, 53 Iowa, 404, 407; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521; *Young v. Hartford F. Ins. Co.*, 45 Iowa, 377; 24 Am. Rep. 784; *Southern L. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606; 24 Am. Rep. 344. See *Wytheville Ins. etc. Co. v. Teiger* (Va. 1893), 18 S. E. Rep. 195.

<sup>189</sup> *New York Cent. Ins. Co. v. National Prot. Ins. Co.*, 20 Barb. (N. Y.) 468.

policy unless such waiver be indorsed thereon in writing.”<sup>190</sup> And an agent may waive prepayment although a receipt delivered to assured with the policy provides that “agents may not deliver policies until the premiums are received, as no policy is in force until paid for,” and the policy also provides that the agent cannot change or waive its conditions.<sup>191</sup> It is held, however, in a Pennsylvania case, that an agent may not waive prepayment of premium if the application states that he has no power to do so.<sup>192</sup> It is also declared in a Connecticut case that the agent has no power to waive such prepayment if the policy states that it shall not be valid till the premium is paid.<sup>193</sup> But if an agent exceeds his actual authority, and the applicant has notice of the fact, the company is not bound as in a case where a local agent assumed to waive a provision that “no insurance would be binding until actual payment of the premium,” and the policy contained a provision that none of its terms could be waived by any one except the secretary of the company.<sup>194</sup> Nor can a mere local agent waive a condition in the policy that the premium shall be paid in money.<sup>195</sup> So it is not a waiver of prepayment where the agent tells the applicant that he may pay the dues on application or when the policy should be delivered.<sup>196</sup> It is said by the court in an Iowa case that “the authorities all agree that a mere agreement to waive prepayment will not put a policy in force where it is not delivered. It is, therefore, the delivery which constitutes the ground of waiver.”<sup>197</sup>

#### § 78. Renewal—Waiver of Prepayment of Premium.

It is equally well settled that it is competent for the company to disregard the condition relative to prepayment of the premium, and upon any renewal to waive by parol the payment in cash of any premium, and this waiver can be shown by proof

<sup>190</sup> *Young v. Hartford F. Ins. Co.*, 45 Iowa, 377; 24 Am. Rep. 784.

<sup>191</sup> *Miller v. Life Ins. Co.*, 12 Wall. (U. S.) 235.

<sup>192</sup> *Greene v. Lycoming F. Ins. Co.*, 91 Pa. St. 387.

<sup>193</sup> *Bouton v. American etc. Ins. Co.*, 25 Conn. 542.

<sup>194</sup> *Wilkins v. State Ins. Co.*, 43 Minn. 177; 45 N. W. Rep. 1.

<sup>195</sup> *Willcuts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300, 309.

<sup>196</sup> *Ormond v. Mutual L. Assn.*, 98 N. C. 158; 1 S. E. Rep. 796.

<sup>197</sup> *Critchett v. American Ins. Co.*, 53 Iowa, 404, 407.



that credit was given or can be inferred from circumstances, and the waiver can be made by the company or any of its duly authorized agents.<sup>198</sup> So where the company accepted an application, issued the renewal, and forwarded it to the agent, stating to him that they would hold him responsible for the premium, it was decided that this amounted to a contract between the company and the applicant to insure his property according to the terms and stipulations of the renewal.<sup>199</sup> A provision in a policy already executed that no insurance, whether original or continued, should be binding until the actual payment of the premium, and the written acknowledgment thereof does not invalidate a subsequent contract by parol to renew such insurance for a premium not paid at the time the risk attaches but postponed to a future day,<sup>200</sup> and where an insurance company agreed that a policy for one year should be a permanent risk, and that its officers should call for the premiums as they became due, and leave the certificates of payment and renewal, and the assured relied upon this arrangement, but before any of the officers called for the renewal premium, the property was destroyed by fire, it was decided that the company was liable for the loss.<sup>201</sup> But an agent who has no power to make a contract of insurance cannot bind the company by a contract to indefinitely postpone the payment of a renewal premium and keep the policy in force in contravention of its provisions.<sup>202</sup>

**§ 79. Prepayment of Premium—Effect of Delivery of Policy.**—Where the contract is otherwise complete, an unconditional delivery of the policy operates as a waiver of the prepayment of the premium, notwithstanding an express provision therein that the company shall not be liable until the premium is actually paid,<sup>203</sup> and the company cannot, under such

<sup>198</sup> *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566.

<sup>199</sup> *Planters' Ins. Co. v. Ray*, 52 Miss. 325.

<sup>200</sup> *First Baptist Church v. Brooklyn F. Ins. Co.*, 19 N. Y. 305.

<sup>201</sup> *First Baptist Church v. Brooklyn F. Ins. Co.*, 18 Barb. (N. Y.) 60.

<sup>202</sup> *Critchett v. American Ins. Co.*, 53 Iowa, 404.

<sup>203</sup> *Southern L. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 203, 606; 24 Am. Rep. 344; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 23 Pac. Rep. 669; *Eagan v. Aetna F. etc. Ins. Co.*, 10 W. Va. 583; *Latoix v. Germania Ins. Co.*, 27 La. Ann. 113; *Boehen v. Williamsburg Ins. Co.*, 35 N. Y. 131;

circumstances, cancel the policy for nonpayment without first putting the insured in default by some act, such as a new demand.<sup>204</sup> But the mere nonpayment of the premium on demand, does not of itself destroy the policy where the company fails to give notice of its election to rescind the contract.<sup>205</sup> It is held that the delivery of a policy does not operate as a waiver of prepayment where the policy provides that it shall not be binding until the premium is paid, and that waiver must be in writing. In such case the agent cannot waive such condition precedent,<sup>206</sup> and although a condition as to prepayment of premium may be waived by the general agent, by delivering the policy without exacting payment, there is no such waiver when the agent merely leaves the policy for examination and requires the party, if he concludes to accept it, to prepay the premium, in accordance with the condition.<sup>207</sup>

**§ 80. Prepayment—Credit may be Given.**—An insurance may be binding without actual prepayment of the premium by an agreement by the company to give credit therefor;<sup>208</sup> and it is held that if the charter of an insurance company be wholly silent as to the power of the corporation to give credit for premiums and to take notes in payment, such a power necessarily results from its power to make insurances and to enable it to advantageously conduct its business.<sup>209</sup> An agent authorized to insure may give credit,<sup>210</sup> and where an agent

90 Am. Dec. 787; *Wytheville Ins. etc. Co. v. Telger* (Va. 1893), 18 S. E. Rep. 195; *Washoe Tool Mfg. Co. v. Hibernia F. Ins. Co.*, 7 Hun (N. Y.), 74; s. c. 66 N. Y. 613; *Equitable Ins. Co. v. McCrea*, 8 Lea (Tenn.), 541; *Miller v. Life Ins. Co.*, 12 Wall. (U. S.) 285.

<sup>204</sup> *Latoix v. Germania Ins. Co.*, 27 La. Ann. 113.

<sup>205</sup> *Washoe Tool Mfg. Co. v. Hibernia F. Ins. Co.*, 7 Hun (N. Y.), 74.

<sup>206</sup> *Pottsville Mut. F. Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137.

<sup>207</sup> *Wood v. Poughkeepsie Ins. Co.*, 32 N. Y. 619.

<sup>208</sup> *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560; *Mississippi Val. Ins. Co. v. Dunklee*, 16 Kan. 158.

<sup>209</sup> *McIntyre v. Preston*, 5 Gilm. (Ill.) 48.

<sup>210</sup> *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560. Agent with authority to take and approve risks and to insure: *Ball etc. Co. v. Aurora F. etc. Ins. Co.*, 20 Fed. Rep. 232. Agent had "full power to receive proposals for insurance, to receive moneys, and to countersign, issue, and renew policies of insurance of the company, subject to such rules and regulations

with no authority to give credit delivers a policy before the premium is paid, but accounts therefor to the company, it is bound.<sup>211</sup> So the agent may agree to hold himself accountable to the company for the cash payment, and that a note should be given by the applicant for the balance of the premium at some future time, and that the insurance should take effect when the proposals were accepted.<sup>212</sup> So an agent may give credit where the policy provides that the insurance shall not be binding until the actual payment of the premium.<sup>213</sup> And credit may be given for a portion of the premium,<sup>214</sup> and the payment may be made partly in cash and partly in notes, as where a life insurance policy was issued to plaintiff's decedent expressed to be made in consideration of a premium already paid, and of a like sum to be annually paid during the continuance of the policy, and providing that the policy should not take effect until the premium was paid, and that the policy should be forfeited "in case any premium due upon this policy shall not be paid at the day when payable." The first premium was paid partly in cash and partly in promissory notes, but the notes were not paid and the insured died. It was held that the policy had taken effect and that the nonpayment of notes did not bar plaintiff's recovery, because the "forfeiture" clause referred to premiums after the first.<sup>215</sup> So the agent may accept the promissory notes of the applicant.<sup>216</sup> So where the agents of an insurance company, acting for themselves, advance the money for the premium to the company, and take the note of the insured for the amount as their own and negotiate it, the company cannot dispute its liability on the ground that the

as are or may be adopted by the company, and such instructions as may from time to time be given by the manager of the company at Cincinnati."

<sup>211</sup> *Agricultural Ins. Co. v. Montague*, 38 Mich. 548; 31 Am. Rep. 326.

<sup>212</sup> *Sheldon v. Life Ins. Co.*, 25 Conn. 207; 65 Am. Dec. 565.

<sup>213</sup> *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; 15 Am. Rep. 612; *O'Brien v. Union Mut. Ins. Co.*, 22 Fed. Rep. 586 (general agent).

<sup>214</sup> *First Baptist Church v. Brooklyn Ins. Co.*, 23 N. Y. 153.

<sup>215</sup> *McAllister v. New England Mut. Ins. Co.*, 101 Mass. 558; 3 Am. Rep. 404.

<sup>216</sup> *Mississippi Valley L. Ins. Co. v. Neyland*, 9 Bush (Ky.), 430. General agent with power to solicit applications and receive first premiums: *Kelly v. St. Louis etc. Life Ins. Co.*, 3 Mo. App. 554.

premium has not been actually paid.<sup>217</sup> So the agent may agree to be himself responsible for the premium.<sup>218</sup> In a Louisiana case the agent was requested to send the bill for the premium to the treasurer of the insured society for payment and he replied, "That's all right," and called several times, but did not find the party, and the contract was held to be complete;<sup>219</sup> and an agreement to pay the premium is sufficient although the property is destroyed before the delivery of the policy.<sup>220</sup>

**§ 81. Prepayment—Mutual Credits—Application on Agent's Debt.**—Where there are mutual credits between the parties, and an authorized agent of the company is indebted to the applicant, the parties may agree that the amount of the premium may be charged or credited, as the case may be, subject to settlement of accounts, and this will constitute a valid prepayment of the premium and be binding upon the company.<sup>221</sup>

**§ 82. Where there are Mutual Credits.**—Where the insurer and insured had mutual credits and struck a balance monthly, this is in effect a payment,<sup>222</sup> and where an application had been sent by plaintiff's agent to defendant's agent, who agreed to take two-thirds the risk, and the amount, duration, and premium were agreed upon, and the two agents had running accounts with each other and settled monthly, the court held that there was evidence for the jury of a contract of insurance, which began immediately;<sup>223</sup> and where the parties had mutual accounts and their course of dealing was to give credit for premiums due to each, and to give receipts as for cash and to balance accounts from time to time, and the plaintiff was

<sup>217</sup> *Home Ins. Co. v. Curtis*, 32 Mich. 402.

<sup>218</sup> *Mississippi Valley L. Ins. Co. v. Neyland*, 9 Bush (Ky.), 430.

<sup>219</sup> *La Societe v. Morris*, 24 La. Ann. 347.

<sup>220</sup> *Felt v. Fire Ins. Assn.*, 20 Fed. Rep. 766.

<sup>221</sup> *Marsh v. Northwestern Nat. Ins. Co.*, 3 Biss. (C. C.) 351. See cases in following sections charging premium to agent personally by company, and agent credits insured as payment: *Wytheville etc. Ins. Co. v. Teiger* (Va. 1893), 18 S. E. Rep. 195.

<sup>222</sup> *Marsh v. Northwestern Nat. Ins. Co.*, 3 Biss. (C. C.) 351.

<sup>223</sup> *Sanborn v. Firemen's Ins. Co.*, 16 Gray (Mass.), 448; 77 Am. Dec. 419.

given a receipt for his premium, such premium is paid when the receipts are given.<sup>224</sup>

**§ 83. Crediting Premium on Agent's Indebtedness to Applicant.**—When an insurance agent, who has authority to issue policies of insurance, issues and delivers a policy upon a building therein described, and agrees with the assured to deduct the premium out of money then in his possession belonging to the assured, and apply it on the payment of the premium, such an agreement is a receipt of the premium, and the company issuing the policy will be bound thereby;<sup>225</sup> and where money is advanced by a subagent to the general agent to be debited against premiums collected by the former, and he applies for insurance, the advancement to the general agent will be considered a payment of the premium.<sup>226</sup> In *Woody v. Old Dominion Insurance Company*<sup>227</sup> an agent authorized to fill up and deliver policies entered into an agreement for insurance with an applicant who tendered the premium to the agent; but the latter, who resided in the house insured, and who owed the former for rent, said he would apply the premium toward the rent, and this was held a valid payment of the premium.

**§ 84. Prepayment—Course of Dealings—Allowing Credit.**—Stipulations making a prepayment of the premium a condition precedent to the attachment of the risk are in some cases governed by the usual course of dealing between the parties to the contract, or between the principal and agent or insurance broker. So an agent authorized to take risks and insure may be also authorized by general usage to give credit.<sup>228</sup> In a Pennsylvania case<sup>229</sup> the company issued and

<sup>224</sup> *Prince of Wales L. Assur. Co. v. Harding*, El. B. & E. 183; 4 Jur., N. S., 851; 27 L. J. Q. B. 297.

<sup>225</sup> *Phoenix Ins. Co. v. Muir*, 28 Neb. 124; 44 N. W. Rep. 97.

<sup>226</sup> *Thompson v. American Tont. L. Ins. Co.*, 46 N. Y. 847.

<sup>227</sup> 31 Gratt. (Va.) 362; 31 Am. Rep. 732.

<sup>228</sup> *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560. See, also, *Boice v. Thames etc. Ins. Co.*, 38 Hun (N. Y.), 246.

<sup>229</sup> *Long v. North British etc. Ins. Co.*, 137 Pa. St. 335; 21 Am. St. Rep. 879; 20 Atl. Rep. 1014.

forwarded a policy to its agents after notification given the plaintiff that a policy which was about to terminate would be renewed unless he gave notice to the contrary. It was a custom between the agent and the insured to give the latter a credit for thirty days, and the premium in this instance was charged to him by such agents, and a credit of thirty days given. Before the expiration of that period, but after a fire, the insured gave his check for the premium, which was retained for two weeks without objection. In an action on the policy it was held to be a question for the jury whether a contract existed. In *Lungstrass v. German Insurance Company*,<sup>230</sup> the agent was accustomed to forward his remittances to the company at the end of each month. He applied for insurance on his goods, and upon receipt of the policy he made an entry of the amount chargeable against him for the premium in a book in which his accounts with the company were regularly kept, and it was decided that he was not obliged to forward the premium before the accustomed time, and that the company was liable. So in another case it was determined that the company might waive a condition providing that the premium should be actually paid before the policy should attach, and if the course of business between the company and one of its agents tended to show that the company was accustomed to substitute the personal liability of the agent for premiums received in the place of the security which the suspension clause in the policy afforded, a nonsuit should not be ordered, but the case should be submitted to the jury,<sup>231</sup> and the contract may be complete without prepayment where it is the custom of the company to give the broker credit until the end of the month.<sup>232</sup> In *Lebanon Mutual Insurance Company v. Hoover*<sup>233</sup> it appeared that by the usual and established course of business between an agent and the company the former was charged for the premiums received by him on all policies and

<sup>230</sup> 48 Mo. 201; 8 Am. Rep. 100.

<sup>231</sup> *Elkins v. Susquehanna Mut. F. Ins. Co.*, 113 Pa. St. 386; 6 Atl. Rep. 222.

<sup>232</sup> *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 418; 11 Am. St. Rep. 674.

<sup>233</sup> 113 Pa. St. 591; 8 Atl. Rep. 163.

renewal certificates obtained through him, whether the insured paid the agent or not, and that he was expected to render regular monthly statements and settle with the company, and the assured was not expected to pay the agent in advance, but only on demand about a month after effecting insurance. It was held that a failure to pay the premium would not prevent a recovery on the policy for a loss. And where insurance brokers, on delivery to them of a policy, are with their knowledge charged in a general account with the premium due on the policy, and they make no objection, the company is liable for the insurance money, notwithstanding the policy provides in terms that the insurance company shall not be liable until the premium shall be actually paid, and that no such provision shall be construed as waived except by some distinct act, such as a clear express agreement indorsed on the policy.<sup>234</sup> But it is held in New Hampshire that the custom of the company to charge the advance premium to the agent on issuing a policy is not a payment unless so understood between the agent and the insured.<sup>235</sup> So it may be shown that by usage in case of a parol agreement to insure, the premium is not due till delivery of the policy.<sup>236</sup> But it is held, however, in a New York case that evidence that the agent of an insurance company frequently waived the condition of prepayment is not admissible to raise an inference of waiver in the absence of other proof tending to establish it.<sup>237</sup> This decision does not, perhaps, conflict with the general rule that, notwithstanding there may be a condition that the policy shall not attach till the premium is actu-

<sup>234</sup> *Bang v. Farmville Ins. etc. Co.*, 1 Hughes (C. C.), 290.

<sup>235</sup> *Brown v. Massachusetts Mut. L. Ins. Co.*, 59 N. H. 298; s. c. 47 Am. Rep. 205. In England, the negotiations are generally carried on through a broker, and the premium is due from assured to the broker and from him to the company: 1 Phillips on Insurance, 3d ed., 274, sec. 507, citing *Fouke v. Pensack*, 2 Lev. 153, and other cases; *Grove v. Dubois*, 1 Term Rep. 112; *Edgar v. Fowler*, 3 East, 222; *De Gaminde v. Pigou*, 4 Taunt. 246; *Parker v. Smith*, 16 East, 382, and several other cases. See, also, 1 Marshall on Insurance, ed. 1810, \*292, et seq., where it is said that the rule that the underwriters give credit to the broker depends upon usage.

<sup>236</sup> *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.), 320.

<sup>237</sup> *Wood v. Poughkeepsie etc. Ins. Co.*, 32 N. Y. 619.

ally paid, nevertheless the insurer cannot successfully set up nonpayment, where the authorized agent of the company, by his accustomed and usual course of dealing with the assured, induces him to rely upon the belief that the condition of prepayment is waived.<sup>238</sup> In *Dinning v. Phoenix Insurance etc. Company*<sup>239</sup> an alleged general custom among agents and brokers to give credit for premiums was set up, but the court found that there was nothing in the course of dealings between the parties to sustain such a claim or warrant any implied waiver of prepayment, and this is on a line with the decision in the New York case above noted.<sup>240</sup> And in connection with these cases we do not believe that a mere custom to give credit to others will be sufficient to hold the company in the absence of other proof, such as a custom to give the applicant credit.<sup>241</sup>

**§ 85. Prepayment of Premium Evidence of Waiver.**—Delivery of the policy without prepayment of the premium is prima facie evidence of waiver,<sup>242</sup> and such waiver may be

<sup>238</sup> See *Tenant v. Travelers' Ins. Co.*, 31 Fed. Rep. 322; *Home L. Ins. Co. v. Pierce*, 75 Ill. 426; *Frankle v. Pennsylvania F. Ins. Co.* (Col. 1883), 9 Fed. Rep. 706; 12 Ins. L. J. 614; *Helme v. Philadelphia L. Ins. Co.*, 61 Pa. St. 107; 100 Am. Dec. 621; *Yonge v. Equitable L. Ins. Co.*, 30 Fed. Rep. 902.

<sup>239</sup> 68 Ill. 414; 3 Ins. L. J. 677.

<sup>240</sup> *Wood v. Poughkeepsie etc. Ins. Co.*, 32 N. Y. 619.

<sup>241</sup> See 1 Wood on Fire Insurance, 2d ed., 68, who says: "But so far as evidence of the practice of the agent to give credit to others is concerned, it is hardly believed that evidence thereof can establish a waiver, and that it is inadmissible to establish a waiver unless connected with other proof to establish it": Citing *Teutonia Ins. Co. v. Anderson*, 77 Ill. 382; *Madison Ins. Co. v. Fellowes*, 1 Disn. (Ohio) 217; *New York Cent. Ins. Co. v. National Prot. Ins. Co.*, 20 Barb. (N. Y.) 468; *Heminway v. Bradford*, 14 Mass. 121; *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20; *Baker v. Union Mut. L. Ins. Co.*, 43 N. Y. 283; *Illinois Cent. Ins. Co. v. Wolf*, 37 Ill. 354; 87 Am. Dec. 251; *Teutonia Ins. Co. v. Mueller*, 77 Ill. 22; *Provident Ins. Co. v. Fernell*, 49 Ill. 180; *Marsh v. North West Ins. Co.*, 3 Biss. (C. C.) 351; *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737; *Barnum v. Childs*, 1 Sand. (N. Y.) 58; *Goit v. National Prot. Ins. Co.*, 25 Barb. (N. Y.) 189; *Sheldon v. Atlantic F. Ins. Co.*, 26 N. Y. 460; 84 Am. Dec. 231.

<sup>242</sup> *Wood v. Poughkeepsie Ins. Co.*, 32 N. Y. 619; see sec. 75, herein; *Church v. Lafayette F. Ins. Co.*, 66 N. Y. 222; *Washoe Tool Mfg. Co. v. Hibernia F. Ins. Co.*, 66 N. Y. 613.



shown by parol.<sup>243</sup> So parol evidence is admissible to show that the agent verbally agreed that a policy of insurance should take effect immediately upon the approval of the application, and that the premium note might be made and the cash premium paid at some future time, at the convenience of the parties; provided that such agreement was made known to and acquiesced in by the defendants,<sup>244</sup> although evidence is admissible to prove whether the delivery was conditional or absolute, yet when a husband, acting as agent for his wife, procures a policy of insurance on his own life in the name and for the benefit of the wife, his subsequent declarations that the policy was delivered conditionally are not admissible as against the wife.<sup>245</sup>

**§ 86. Effect of Receipt in Policy for Premium.**—In this country the effect of an acknowledgment of the receipt of the premium in a policy of insurance which has been delivered to the assured has been the subject of much discussion. It is held in an Indiana case that if an agent delivers a policy which acknowledges that the premium has been paid, this concludes

<sup>243</sup> *Pino v. Merchants' Ins. Co.*, 19 La. Ann. 214; 92 Am. Dec. 529.

<sup>244</sup> *Sheldon v. Connecticut Mut. L. Ins. Co.*, 25 Conn. 207; 65 Am. Dec. 565.

<sup>245</sup> *Southern L. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606; 24 Am. Rep. 344. *Emerigon* (*Emerigon on Insurance*, Meredith's ed., 1850, c. iii, sec. 6, p. 69), says: "If the policy imports that the premium has been received, there is novation, though the payment has not been effective, and the sum was passed into account current. It becomes, then, an ordinary and purely chirographic debt": "Novation" defined in note f, id., p. 68. He then notes an old custom whereby the clause, "received the premium," was withdrawn from the policy; the brokers held themselves as debtors to the insurer and creditors of the assured for the amount of the premium. This species of transfer worked a novation. The premium ceased to be due as premium. It was due as money advanced or to be advanced by the broker. In England, in case of marine policies negotiated through a broker, the cases evidence a custom for the underwriter to credit the broker with the premium, and the premium becomes due from the latter to the former. The broker generally credits the assured with the premium; therefore, the acknowledgment of its receipt in the policy in England stands on a different basis than in the United States, where the liability, as a rule, is from the assured to the underwriter. In England, the assured is estopped by the receipt: See chapter on Agency.

the company, in the absence of fraud or mistake, from subsequently assailing the policy on account of failure to pay the premium.<sup>246</sup> In a New York case the fact that the assured had possession of the policy which provided for payment of a specified sum in advance as a part of the consideration, was held no evidence of payment of the first premium.<sup>247</sup> In California, it is held that if an insurance policy contains a formal receipt of the premium, its unconditional delivery is conclusive evidence of payment so as to estop the company from denying the validity of the policy, notwithstanding the declaration in it that it shall not be binding until the premium is actually paid; that the same result follows where the policy is delivered as a valid and completed contract upon a consideration expressed therein, the receipt of which is impliedly acknowledged.<sup>248</sup> In an Illinois case<sup>249</sup> the court declares that an insurance company will be estopped on the grounds of public policy to dispute its receipt for the purpose of avoiding the policy. The same ruling obtains in Tennessee,<sup>250</sup> but it is held in the same case that the company may show nonpayment in an action to collect the premium, or in deducting it from the amount sought to be recovered. So in Maryland<sup>251</sup> it is declared that an insurance company will not be permitted to allege a want of consideration for its promise by disputing its acknowledgment of the receipt of the premium when sued on the policy after a loss has happened. In a New Jersey case<sup>252</sup> the policy was executed by the president and secretary of the company, and contained a formal acknowledgment of the payment of the premium, and it was decided that this prevented the company from averring or showing nonpayment for

<sup>246</sup> Home etc. Co. v. Gilman, 112 Ind. 7.

<sup>247</sup> Quinby v. New York L. Ins. Co., 71 Hun (N. Y.), 104; 24 N. Y. Supp. 593; 54 N. Y. 82.

<sup>248</sup> Farnum v. Phoenix Ins. Co., 83 Cal. 246; 17 Am. St. Rep. 233.

<sup>249</sup> Teutonia L. Ins. Co. v. Anderson, 77 Ill. 384; Same v. Miller, 77 Ill. 22.

<sup>250</sup> Southern L. Ins. Co. v. Booker, 9 Heisk. (Tenn.) 606; 24 Am. Rep. 344.

<sup>251</sup> Consolidated Real Estate etc. Co. v. Cashou, 41 Md. 59.

<sup>252</sup> Basch v. Humboldt etc. Ins. Co., 35 N. J. 429; 5 Bennett's Fire Insurance Cases, 421.

the purpose of proving that the contract had no legal existence, and that it conclusively admitted payment of the premium so far as was necessary to give validity to the contract, and it was said by Beasley, J., that the usual legal rule that a receipt was only prima facie evidence of payment, and might be explained, did not apply "where the question involved is not only as to the fact of payment, but as to the existence of rights springing out of the contract," and that "with a view of defeating such rights the party giving the receipt cannot contradict it," and he adds "an acknowledgment of an act done contained in a written contract, and which act is requisite to put it in force, is as conclusive against the party making it as any other part of the contract, and cannot be contradicted or varied by parol." Mr. Wood<sup>253</sup> cites this case somewhat at length as an authority; a recent writer, however,<sup>254</sup> dissents therefrom. Mr. May<sup>255</sup> states that such recital in the policy is only prima facie evidence of payment. Mr. Marshall<sup>256</sup> asserts that the payment or nonpayment of the premium can have no effect on the validity of the contract, as an action will lie to recover the premium "notwithstanding the formal acknowledgment of it in the policy, which is not inserted there as conclusive evidence of the actual payment of the premium, but to preclude the necessity of proving it in case of loss," and Mr. Phillips<sup>257</sup> states that the acknowledgment is, according to general practice, "substantially true," but is nevertheless only prima facie evidence of payment which may be rebutted. The cases are numerous, however, which hold that where a policy duly executed and delivered acknowledges the payment of the premium, such receipt, in the absence of fraud, duress, or mistake estops the company from denying the same, and is conclusive evidence of payment;<sup>258</sup> while other courts qualify this rule by

<sup>253</sup> 1 Wood on Fire Insurance, 2d ed., 69.

<sup>254</sup> Ostrander on Fire Insurance, sec. 95, p. 220.

<sup>255</sup> 1 May on Insurance, 3d ed., sec. 359, citing *Massachusetts*, *New York*, *Indiana*, *United States*, *New Hampshire*, *Texas*, and *Louisiana* cases. See, also, *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 32, and cases cited.

<sup>256</sup> 1 Marshall on Insurance, §35.

<sup>257</sup> 1 Phillips on Insurance, 3d ed., secs. 275-78, 512-15.

<sup>258</sup> *Teutonia L. Ins. Co. v. Anderson*, 77 Ill. 384; *Provident L. Ins.*

holding that it is evidence of payment to the extent, at least, that such payment is necessary to give validity to the contract.<sup>259</sup> It is also held in North Carolina that parol evidence is admissible to explain a receipt given by the agent of a fire insurance company for the premium on the policy,<sup>260</sup> and a suit lies at the instance of a policy holder to recover a portion of the unearned premium notwithstanding that a promissory note which has been given for the premium has not been paid.<sup>261</sup> Other cases hold, however, that the delivery of the receipt for payment of premium is not conclusive, and that where the policy provides for payment in the lifetime of assured of an advance premium it must be done.<sup>262</sup> In *Ormond v. Mutual Life Association*<sup>263</sup> the insured agreed to pay the dues to the agent upon delivery of the policy. Attached to the policy was a receipt for the dues, providing that when payment was made to an agent such agent must countersign it at the date of payment. The policy was sent to the insured without the receipt being countersigned by the agent. It was decided that this amounted to a declaration that the required payment had not been made, and must be made before the policy could become binding. If the insurer delivers to a broker for the assured a policy containing an acknowledgment of the receipt of the premium, they cannot insist, as a condition precedent, on their

*Co. v. Farrell*, 49 Ill. 180; *Illinois Cent. Ins. Co. v. Wolf*, 37 Ill. 354; 87 Am. Dec. 251; *Savage v. Phoenix Ins. Co.*, 12 Mont. 258; 33 Am. St. Rep. 591; 31 Pac. Rep. 66; 21 Ins. L. J. 987; *Consolidated F. Ins. Co. v. Cashaw*, 41 Md. 59; *Madison Ins. Co. v. Fellows*, 1 Disn. (Ohio) 217; 2 Disn. (Ohio) 128; *Dalzell v. Mair*, 1 Camp. 532; *Cumming v. Forrester*, 1 Maule & S. 499; *Home Ins. Co. v. Gilman*, 112 Ind. 7; 13 N. E. Rep. 118; 17 Ins. L. J. 12; *Michael v. Mutual Ins. Co.*, 10 La. Ann. 737; *Goit v. National etc. Protection Ins. Co.*, 25 Barb. (N. Y.) 189; *De Gaminde v. Pigon*, 4 Taunt. 246; *Anderson v. Thornton*, 8 Welsb. H. & G. 424; *Kline v. National B. Assn.*, 111 Ind. 462; 11 N. E. Rep. 620; 60 Am. Rep. 703; 9 West. Rep. 284; *Deering's Annot. Civ. Code, Cal.*, sec. 2598.

<sup>259</sup> *In re Insurance Co.*, 22 Fed. Rep. 109.

<sup>260</sup> *Fenebee v. North Carolina etc. Ins. Co.*, 68 N. C. 11.

<sup>261</sup> *Hemingway v. Bradford*, 14 Mass. 121.

<sup>262</sup> *Brown v. Insurance Co.*, 59 N. H. 298; *Ormond v. Mutual L. Ins. Assn.*, 96 N. C. 158; 1 S. E. Rep. 796; *Davis v. Massachusetts L. Ins. Co.*, 13 Blatchf. (C. C.) 462. See, also, 1 May on Insurance (Parsons) sec. 359, and cases cited. See *Troy F. Ins. Co. v. Carpenter*, 4 Wis. 20.

<sup>263</sup> 96 N. C. 158; 1 S. E. Rep. 796.

actual receipt of the premium note which was delivered by the assured to the broker at the time of receiving the policy, and afterward delivered to the underwriters,<sup>264</sup> and the burden is upon the insurance company to prove nonpayment of the premium note, in order to avoid a policy of insurance made and accepted on condition that it should cease and determine upon failure by the assured to pay a premium note when due given by him to the insurers.<sup>265</sup> It is certainly true that the insurer can waive prepayment of the premium, and if the policy be delivered without exacting such prepayment its validity is established, provided always that the contract of assurance is otherwise binding. It is also true that if the contract be completed and is valid and the note has attached, that the insurer has an action for the premium earned, and the insured either a suit for specific performance, or an action for indemnity<sup>266</sup> may be compelled in equity. Certain rights have attached and the insured may, with the knowledge and acquiescence of the insurer, have rested to his prejudice upon those rights. The contract has been completed and the policy has become valid and binding.<sup>267</sup> At exactly what point, then, does the flaw exist which will enable the insurer to aver or prove that the premium has not been paid for the purpose of escaping liability on a contract which the assured, resting his belief upon the precedent established by the adjudicated cases, has the right to

<sup>264</sup> *Mayo v. Pew*, 101 Mass. 555.

<sup>265</sup> *Hodsdon v. Guardian L. Ins. Co.*, 97 Mass. 144; 93 Am. Dec. 73.

<sup>266</sup> *Gerrish v. German Ins. Co.*, 55 N. H. 355; *Dinning v. Phoenix Ins. Co.*, 68 Ill. 414; *N. E. Ins. Co. v. Robinson*, 25 Ind. 536; *Phoenix Ins. Co. v. Ryland*, 69 Ind. 437; 16 Atl. Rep. 109; 1 Law. Rep. Annot. 548. It is held in *Carpenter v. Mutual Safety Ins. Co.*, 4 Sand. Ch. (N. Y.) 408, that an agreement to insure, evidenced by the receipt for the premium, may be specifically enforced, and if a loss has happened, payment may be compelled in equity. As to life policies, where the premium is paid in advance, the contract is held not to bind the insured to pay, the forfeiture of the policy being the result of nonpayment when due, although it is held, a contract obligation on the part of a member of a co-operative assessment company may exist and be enforced at law to pay bimonthly a specified sum: *Smith v. Bown* (N. Y. Sup. Ct. 1894), 58 N. Y. 605.

<sup>267</sup> Even though the premium be never paid, decides the court in *Miller v. Life Ins. Co.*, 12 Wall. (U. S.) 285; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; 17 Am. St. Rep. 233.

consider completed and binding? In view, therefore, of the weight of authority, such receipt is conclusive evidence of payment, so far as the validity of the policy rests thereon, and the assured is estopped to deny such acknowledgement for the purpose of escaping liability on the contract, unless fraud, duress, or mistake be shown. But where payment of the premium is sought to be enforced, the receipt should be only *prima facie* evidence of payment.<sup>268</sup>

*SUBDIV. IV. Completion of Contract: Delivery of Policy; Knowledge of Loss.*

§ 90. **Delivery of Policy not Necessary to Complete Contract.**—A promise to insure is generally performed by issuing a policy or procuring one to be issued,<sup>269</sup> and if the insurer delivers the policy and receives the premium, he is estopped from denying the fact that a contract of insurance was made.<sup>270</sup> But a contract to issue an insurance policy, the agreement being otherwise complete, is equivalent to the actual issuance of the policy so far as the binding force of the contract is concerned;<sup>271</sup> since if a sufficient contract has been made neither a policy nor a certificate is necessary to make the company liable.<sup>272</sup> So in mutual benefit societies, if the insured has complied with all the other requirements of the society, the fact that he has not taken out a certificate or that one has not been delivered to him does not prevent a recovery,<sup>273</sup> and such recovery may be had without producing such certificate,<sup>274</sup> and where an application was made to an agent and the agent

<sup>268</sup> *Norton v. Phoenix L. Ins. Co.*, 36 Conn. 503; 4 Am. Rep. 98. See *Life Ins. Co. v. Davidge*, 51 Tex. 244; *Pitt v. Berkshire L. Ins. Co.*, 100 Mass. 500; *Southern L. Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606; 24 Am. Rep. 344; *Ryan v. Band*, 26 N. H. 12.

<sup>269</sup> *Scranton Steel Co. v. Wards etc. Line*, 40 Fed. Rep. 866.

<sup>270</sup> *Re State of Pennsylvania Ins. Co.*, 22 Fed. Rep. 109.

<sup>271</sup> *Springer v. Anglo-Nevada Ins. Corp.*, 33 N. Y. 543; 11 N. Y. Supp. 533.

<sup>272</sup> *Blake v. Hamburg-Bremen F. Ins. Co.*, 67 Tex. 160; 60 Am. Rep. 15. See *Newark Mach. Co. v. Kenton Ins. Co.* (Ohio, 1894), 35 N. E. Rep. 1060; 31 Week. L. Bull. 51.

<sup>273</sup> *Bishop v. Grand Lodge etc.*, 112 N. Y. 627; 20 N. E. Rep. 562; *Lischer v. Supreme L. K. of H.*, 72 Mich. 316; 40 N. W. Rep. 545.

<sup>274</sup> *Lorscher v. Supreme L. K. of H.*, 72 Mich. 316; 40 N. W. Rep. 545.

agreed to issue and send the applicant a policy on a certain day, and the policy was in fact issued on and bore date of that day, but was not delivered nor the premium paid for several days thereafter, it was held that the policy became operative and binding from the day it was issued though not delivered.<sup>275</sup>

**§ 91. Actual or Manual Delivery of Policy not Necessary to Complete Contract.**—If the contract of insurance is otherwise complete, and the parties intend that it shall be effectual without the policy being actually delivered, an actual or manual delivery is unnecessary;<sup>276</sup> and although it is intended to issue the policy, yet if the terms have been agreed upon and acts have been done which would entitle the applicant to a policy, or if by custom or by rules of the company, or by agreement or otherwise, the policy is not required to be immediately delivered, the contract may be complete for the reception of the policy is not a prerequisite to a contract of insurance.<sup>277</sup> So the assured need not formally accept nor take away a policy to complete the delivery,<sup>278</sup> and where a policy of life insurance was delivered to the broker to whom the application was made but the applicant died without having received the policy, it was held that the contract was complete.<sup>279</sup>

**§ 92. Agreement to Deliver Policy.**—Demand is Unnecessary where an insurance policy is agreed to be delivered within a certain time.<sup>280</sup>

**§ 93. There may be a Constructive Delivery.**—That there may be a constructive delivery of the policy is un-

<sup>275</sup> *Hubbard v. Hartford F. Ins. Co.*, 33 Iowa, 325; 11 Am. Rep. 125.

<sup>276</sup> *Loring v. Proctor*, 26 Me. 18; *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560.

<sup>277</sup> *Blanchard v. Waite*, 28 Me. 51; 48 Am. Dec. 474; *Yonge v. Equitable L. Assur. Soc.*, 30 Fed. Rep. 902; 1 Corp. L. J. 531; *Alabama Gold L. Ins. Co. v. Herron*, 56 Miss. 643; *Warren v. Ocean Ins. Co.*, 16 Me. 439, 451; 33 Am. Dec. 674; *Sheldon v. Conn. Mut. L. Ins. Co.*, 25 Conn. 207; 65 Am. Dec. 565.

<sup>278</sup> *Xenos v. Wickham*, 2 L. R. Eng. & Irish App. 296; 16 L. T., N. S., 800; 16 Week. Rep. 38; 36 L. J. Com. P. 313.

<sup>279</sup> *Mutual L. Ins. Co. v. Thompson*, 94 Ky. 253; 22 Ins. L. J. 481.

<sup>280</sup> *West Mass. Ins. Co. v. Duffey*, 2 Kan. 347.

doubted.<sup>281</sup> In the following cases, however, the circumstances were held not sufficient to justify finding such constructive delivery. Thus, in *Herman v. Phoenix Mutual Life Insurance Company*<sup>282</sup> the company executed and forwarded a policy to its agent to be delivered to the applicant H. on receipt of the premium. The agent took the policy to H.'s place of business, but he was temporarily absent from the state and the policy was exhibited to the son, who was informed by the agent that the first premium was payable in cash and a note. The son did not pay the cash, but gave his father's note as required, and the agent accepted the same and took it away with the policy, stating that he would keep the policy good till the father's return. The father died while so absent, and the court decided that there was no actual or constructive delivery of the policy.<sup>283</sup> So where there was no payment of the premium due upon a life policy, and payment of only one-half of the premium due had been waived, it was held that a letter by the agent to the applicant stating that "your policy" has arrived did not amount to a constructive delivery.<sup>284</sup>

**§ 94. Delivery—Possession of Policy by Assured.**—Possession of the policy by the assured is only prima facie evidence of its delivery, as where it appears that it was delivered subject to examination by the assured.<sup>285</sup> So mere possession by the assignee of the assured of a life policy which recites on its face that it is to take effect only when countersigned by the agent, and which is not so countersigned, is no evidence that the policy was ever delivered to the assured.<sup>286</sup>

**§ 95. Neglect of Assurer to Deliver Policy.**—Non-delivery by reason of negligence of the company or its agents

<sup>281</sup> *McLachlan v. Aetna Ins. Co.*, 4 Allen (N. B.), 173; *Home Ins. Co. v. Curtis*, 32 Mich. 402; 5 Ins. L. J. 120.

<sup>282</sup> 17 Minn. 153; 10 Am. Rep. 154.

<sup>283</sup> See, also, *Markey v. Mutual B. etc. Ins. Co.*, 103 Mass. 78; 118 Mass. 178; 126 Mass. 158.

<sup>284</sup> *Union Cent. L. Ins. Co. v. Pauley*, 8 Moon (Ind. App.), 85; 35 N. E. Rep. 190.

<sup>285</sup> *Davis v. Massachusetts Mut. L. Ins. Co.*, 13 Blatchf. (C. C.) 462; *Prall v. Mutual etc. L. Assur. Co.*, 5 Daly (N. Y.), 298; *Markey v. Mutual B. etc. Ins. Co.*, 103 Mass. 78; 118 Mass. 178; 126 Mass. 158.

<sup>286</sup> *Prall v. Mutual etc. L. Assur. Soc.*, 5 Daly (N. Y.), 298.



does not relieve the insurer of liability where the contract between the parties is complete, as where the application has been accepted and the terms concluded, and the premium has been tendered, or the applicant has agreed to pay the first premium on delivery of the policy,<sup>287</sup> since a corporation which is bound in good faith to execute and deliver a policy in the usual form, and thereby consummate the contract, cannot escape liability by neglecting so to do.<sup>288</sup>

**§ 96. Conditional Delivery.**—A policy may be conditionally delivered, and in such case the contract is not complete until the condition be complied with,<sup>289</sup> as where the delivery was conditioned upon the agent obtaining the surrender value or paid-up policies in place of certain other policies of the applicant left with him for that purpose, and the agent did not succeed in so doing.<sup>290</sup>

**§ 97. Parol Evidence Admissible to Show Conditional Delivery.**—Parol evidence is admissible to show a conditional delivery. So in a case where the policy was expressed to have been executed and delivered, parol evidence was held admissible that it was agreed that a previous policy should be surrendered and a new policy issued as a substitute therefor, which agreement was not performed, but the prior policy enforced and the amount thereof paid.<sup>291</sup>

**§ 98. When Actual Delivery of the Policy Necessary**  
If there be a provision or an agreement that the policy shall not be in force until actual delivery to the insured, the contract is not consummated nor the company bound in the absence of such delivery;<sup>292</sup> and this has been so held even though the application makes the policy for the benefit of the appli-

<sup>287</sup> *Yonge v. Equitable L. Assur. Soc.*, 30 Fed. Rep. 902; 1 Corp. L. J. 531.

<sup>288</sup> *Bradley v. Nashville Ins. Co.*, 3 La. Ann. 708; 48 Am. Dec. 465.

<sup>289</sup> *Le Roy v. Park Ins. Co.*, 39 N. Y. 56; *Rogers v. Charter Oak L. Ins. Co.*, 41 Conn. 97; *Benton v. Martin*, 52 N. Y. 570.

<sup>290</sup> *Harneckell v. New York L. Ins. Co.*, 40 Hun (N. Y.), 558.

<sup>291</sup> *Faunce v. State etc. Ins. Co.*, 101 Mass. 279.

<sup>292</sup> *Kohen v. Mutual Res. F. L. Assn.*, 28 Fed. Rep. 705; *Misselhorn v. Same*, 30 Fed. Rep. 545.

cant's wife, and although there was a day's delay in passing on said application, when otherwise it might have reached the applicant before his death.<sup>293</sup> So where a policy upon the life of A payable to B was conditioned not to be binding until delivered to A in good health, it was held that a delivery to B after the death of A was not binding upon the insurer.<sup>294</sup> The rule above stated is, however, subject to certain qualifications, as will be noted elsewhere, as in cases of waiver or delivery to an agent, etc.

**§ 99. Delivery—Misrepresentation or Fraud.**—If the delivery be obtained by misrepresentation or fraud, it can have no effect as a binding contract, as in case the assured has knowledge of the loss at the time the application is made and conceals the fact.<sup>295</sup>

**§ 100. Delivery—Notice to Assured of Execution of Policy.**—An actual delivery of the policy is not essential to the completion of the contract where an application has been made, accepted, and the terms agreed upon, and the policy executed and notice thereof given to the assured.<sup>296</sup> In *Myers v. Liverpool etc. Insurance Company*<sup>297</sup> application was made to an agent for a fire policy; thereafter the applicant was notified by the agent that the policy was ready, and he was requested to call for it, which he did several times, but did not find the agent in. The policy was finally canceled by the agent and soon after the premises were destroyed by fire, and it was held that no action could be maintained on the contract.

**§ 101. Delivery to Agent of Insured or to Third Person.** The delivery need not be made personally to the insured but

<sup>293</sup> *Kohen v. Mutual Res. F. L. Assn.*, 23 Fed. Rep. 705.

<sup>294</sup> *McClair v. Mutual Res. F. L. Assn.*, 55 N. J. L. 187; 26 Atl. Rep. 78.

<sup>295</sup> *Piedmont Ins. Co. v. Ewing*, 92 U. S. 377; *Fitzherbert v. Mather*, 1 Term Rep. 12; *Wales v. New York Bowery F. Ins. Co.*, 37 Minn. 106; 33 N. W. Rep. 322; *Whitley v. Piedmont etc. Ins. Co.*, 71 N. C. 490; *Edwards v. Footner*, 1 Camp. 530.

<sup>296</sup> *Bragdon v. Appleton M. F. Ins. Co.*, 42 Me. 259; *Sheldon v. Life Ins. Co.*, 25 Conn. 207; 65 Am. Dec. 565.

<sup>297</sup> 121 Mass. 338.

may be to a third person for him, or to the order and control of a third person, or to the agent of the insured, so the delivery is effectual to bind the contract where the company's agent under an agreement with the assured holds the policy subject to the order and control of a third person, whose mortgage interest is covered by it, though such third person does not call for or receive it;<sup>298</sup> but where the delivery is to a third party, until it can be learned whether the company will accept the risk, and it is understood that if the company refuses to insure, the applicant will try to obtain insurance in another company, and a loss occurs before the agent learns whether the risk has been accepted or not, no contract is consummated, although the applicant has paid the premium.<sup>299</sup> But the delivery is sufficient to complete the contract where it is delivered to the company's agent under a stipulation in a proposal for insurance that such agent shall act for both parties.<sup>300</sup> If the policy, however, is handed to a messenger of the assured, his acts and declarations are inadmissible to bind the assured in the absence of proof of his authority.<sup>301</sup>

**§ 102. Delivery by and to Agent—Policy Held by Agent.** A delivery of a policy by an authorized agent is effectual to bind the principals although it be delivered by him to another agent from whom the application was received, and to whom the premium is charged, it being delivered by the latter to the assured.<sup>302</sup> But the rule is otherwise where the policy is intended as a substitute for an existing policy in another company, but is not delivered, and the insured has no knowledge thereof until after the loss. So the company will be bound by a delivery by its agent where the premium has been paid notwithstanding the actual knowledge of the assured that the company intended to revoke the agent's authority, where the delivery takes place before such revocation and the agent has

<sup>298</sup> *Home Ins. Co. v. Curtis*, 32 Mich. 402.

<sup>299</sup> *Brown v. American Cent. Ins. Co.*, 70 Iowa, 390; 30 N. W. Rep. 647.

<sup>300</sup> *Alabama Gold L. Ins. Co. v. Herron*, 56 Miss. 643.

<sup>301</sup> *Williams v. Niagara F. Ins. Co.*, 50 Iowa, 561.

<sup>302</sup> *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65.

no knowledge of the company's purpose.<sup>303</sup> So where the authorized agent delivers the policy to another to deliver to the assured, this is a delivery by the company.<sup>304</sup> Again, the delivery may bind the company where the policy is retained by its agent, although only a part of the premium has been paid by the assured,<sup>305</sup> and where it is expressly agreed that the policy shall be held by the agent in his safe for the assured, this is a sufficient delivery, and the assured's right is perfected.<sup>306</sup> So where an agent of the defendant company was also agent of another company, and he had charge of B.'s insurance, selecting the companies and receiving his policies, and a policy having been canceled he insured the property in the defendant company, notifying both parties thereof, charging the premium to the assured in their private account, and the policy was placed by him in his safe, it was held that this completed the contract and bound defendant,<sup>307</sup> and, as a rule, an unconditional delivery of the policy to the agent for delivery to the insured binds the company, and the agent may not refuse to deliver upon tender of the premium, although the insured may be seriously sick.<sup>308</sup>

**§103. Delivery—Agreement Completed Before Loss.—**

Where the contract is completed and the risk commenced, but the loss or a dangerous sickness occurs thereafter and before delivery of the policy or certificate, the company is liable, even though the premium has not been paid, provided there be no fraud or concealment by the insured.<sup>309</sup> So where an applica-

<sup>303</sup> *Lightbody v. North America Ins. Co.*, 23 Wend. (N. Y.) 18.

<sup>304</sup> *Kelley v. Commonwealth Ins. Co.*, 10 Bosw. (N. Y.) 82, 95.

<sup>305</sup> *Wheeler v. Watertown F. Ins. Co.*, 131 Mass. 1.

<sup>306</sup> *Insurance Co. v. Colt*, 20 Wall. (U. S.) 560.

<sup>307</sup> *Dibble v. Northern Assur. Co. of London*, 70 Mich. 1; 14 Am. St. Rep. 470; 37 N. W. Rep. 704; 14 West. Rep. 213; 3 Mich. 345.

<sup>308</sup> *Schwartz v. Germania L. Ins. Co.*, 21 Minn. 215; *Yonge v. Equitable L. Assur. Soc.*, 30 Fed. Rep. 902.

<sup>309</sup> *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645; 72 Am. Dec. 379; *Southern L. Ins. Co. v. Kempton*, 56 Ga. 339; *Kohne v. Insurance Co. of North America*, 1 Wash. (C. C.) 93; *Ellis v. Albany etc. Ins. Co.*, 50 N. Y. 402; 10 Am. Rep. 495; *City of Davenport v. Peoria etc. Co.*, 17 Iowa, 276; *Gausser v. Firemen's Fund Ins. Co.*, 38 Minn. 74; 35 N. W. Rep. 584; *Walker v. Metropolitan Ins. Co.*, 56 Me. 371. In this case  
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tion was made for life insurance and the sum of fifty dollars was paid to be applied on the first year's premium, and the policy was forwarded to the agent for delivery, and the insured died and the agent refused to deliver it, although the balance of the premium was offered, the policy was held to have attached.<sup>310</sup> So where the premium is to be paid on delivery of the policy, and a loss by fire occurs before delivery, the company is liable.<sup>311</sup> In *Fried v. Royal Insurance Company*<sup>312</sup> the plaintiff made a proposal for insurance on the life of her husband, and advanced the usual premium for one year, and received therefor a receipt, providing substantially that the policy was to be forwarded to the head office at Liverpool, and if accepted a policy was to be issued; if rejected, the premium was to be returned; if the husband died before decision should be received the sum insured was to be paid. The proposal was accepted and the policy returned to be executed by the agent and delivered. The agent executed but refused to deliver it, on account of an alleged unfavorable change in the husband's health. The husband died soon after and the defendant refused payment, claiming that the contract was never consummated, and that the acceptance must be qualified by the company's standing instructions to the agent not to deliver a policy if a change had taken place in the health of the assured. The court, however, decided that the acceptance was absolute and unqualified, and could not be limited by private instructions to the agent of which the plaintiff had no notice, and if the contract was in violation of the instructions or inconsistent therewith, the defendant ratified the same; that it was competent for the defendant to contract in entire disregard of instructions to its agent; that they were chargeable with knowledge that the contract was inconsistent with the agent's alleged instructions, and with that knowledge had assented to it, and that a recovery could be had by the plaintiff. And where the agreement is completed before loss, the assured has the right

the policy was not issued nor the premium paid: *Whitman v. American Cent. Ins. Co.*, 14 Lea (Tenn.), 327 (case of substituted policy).

<sup>310</sup> *Cooper v. Pacific Mut. Ins. Co.*, 7 Nev. 166; 8 Am. Rep. 705.

<sup>311</sup> *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171; 17 Am. Dec. 322.

<sup>312</sup> 50 N. Y. 243.

to receive a policy although he knows that the company intended to revoke the agent's authority, but had not actually done so when the agent tendered the policy.<sup>313</sup>

§ 104. **Delivery—Agreement Incomplete at Time of Loss.**—If the contract is not completed, and a loss occurs or the insured dies, the company may refuse to deliver the policy or receive the premium, or otherwise consummate the contract, as where the policy was withheld until payment of the premium, which had not been made when the assured died.<sup>314</sup> In a Pennsylvania case the application was made to a mutual company and the agreement was that the premium should be paid on delivery of the policy. The policy was drawn without the applicant's signature, but he was enrolled on the company's books as a member. A fire occurred and delivery of the policy was refused, although the premium was tendered, and it was held that the applicant's liability to contribute to losses was not fixed, that the contract was not completed, and therefore no action could be maintained for a policy.<sup>315</sup> So where an agent represented several companies and an application was made to him for insurance, and part of the premium paid, and after a loss the balance was paid and a policy demanded, it was held that no action could be maintained to compel delivery of a policy in the absence of evidence that a contract of insurance had been completed with some particular company.<sup>316</sup> So the company may refuse to deliver a life policy although it is made out and mailed to the agent to be countersigned and delivered, it being provided that it shall take effect only when countersigned by the agent, and the party dies before the policy reaches the agent;<sup>317</sup> and where a life policy was not to be in force until "signed by the officers of the association and delivered to the applicant," and was not made out until after the death of the applicant and in ignorance of it, and was then delivered at the proper place, it was declared void.<sup>318</sup> So where a

<sup>313</sup> *Lightbody v. North America Ins. Co.*, 23 Wend. (N. Y.) 18.

<sup>314</sup> *Collins v. Insurance Co.*, 7 Phila. (Pa.) 201.

<sup>315</sup> *Schaffer v. Lehigh etc. Ins. Co.*, 89 Pa. St. 296.

<sup>316</sup> *New Orleans Ins. Assn. v. Boniel*, 20 Fla. 815.

<sup>317</sup> *Noyes v. Phoenix Mut. L. Ins. Co.*, 1 Mo. App. 584.

<sup>318</sup> *Misselhorn v. Mutual Res. F. Assn.*, 30 Fed. Rep. 545.

policy provides that under no circumstances shall it be enforced until the premium is paid, if the assured dies before such payment and before delivery of the policy, the policy is inoperative, notwithstanding the company's agent has told the assured that he could pay when the policy was delivered.<sup>319</sup> Nor is the company liable in a case where an applicant for life insurance dies before the application is forwarded to the company, although the applicant has given his note for the amount of the first premium.<sup>320</sup> And where in an action upon a fire policy it appeared that the agent of the insurer, after writing the policy, forwarded it to one S., with instructions to tender it to the plaintiff in renewal of an expired policy, but before it was so tendered, the property was destroyed and S. received instructions by wire not to deliver the policy, and he told the plaintiff of the receipt of the policy by him and his instructions not to deliver it, and upon the following day the plaintiff wired S. to hold the policy, which had, however, been returned to the agent of whom a demand therefor was made and the premium tendered, it was held that the contract was not complete;<sup>321</sup> and where a policy was assigned and left with the company to be approved, and such approval was delayed until assured should give a premium note, and a loss occurred before the note was given, it was held that the company could not collect his assessment for the loss, as no contract of insurance existed.<sup>322</sup>

**§ 105. Loss Before Date of Contract—Policy Retroactive.**—An insurance policy may be retroactive, and so provide for indemnity for a loss which happened anterior to the date of the policy. In marine insurance a policy can be lawfully effected upon property "lost or not lost"; but this phrase so used has reference to cases where the property has started upon its voyage and the parties to the insurance have no knowledge whether it has been lost or not. In such cases the insurance is against an unknown event, and the underwriter takes the risk

<sup>319</sup> *Ormond v. Fidelity L. Assn.*, 96 N. C. 158.

<sup>320</sup> *Covenant Mutual B. Assn. v. Conway*, 10 Ill. App. 348.

<sup>321</sup> *New York Lumber etc. Co. v. People's F. Ins. Co.*, 96 Mich. 20; 55 N. W. Rep. 434.

<sup>322</sup> *Cranberry etc. Co. v. Hawk* (N. J. Ch. 1888), 14 Atl. Rep. 745.

of the arrival of the property at its destination, and thus there is something to insure.<sup>323</sup> So a policy may contain the words "lost or not lost," and cover a cargo on board a ship then on a whaling voyage, beginning the adventure on said cargo as aforesaid,<sup>324</sup> and the property may be covered, although it was lost eight hours before the policy was effected.<sup>325</sup> So an insurance will be valid where there is no fraud in the case, although made after a loss and before notice thereof, and notwithstanding the vessel was cast away and lost about ninety miles from the port of destination, where some of the partners who procured the insurance resided.<sup>326</sup> And a policy will be upheld although the owners went to the company's office late in the evening and obtained insurance on a vessel which was past due and lost, and news of such loss had reached the city, although it was not proven to have reached the owners;<sup>327</sup> and a policy may be retroactive where, in the absence of fraud, concealment, or misrepresentation, it is signed after a loss has occurred for a risk taken to commence before its date, though there be no clause equivalent to "lost or not lost";<sup>328</sup> for the policy need not contain the words "lost or not lost" to cover losses prior to its date. It is sufficient that it appear that the insurance was intended to cover prior losses.<sup>329</sup> And a retrospective fire insurance contract made when the thing insured is distant and its status unknown to either party will bind the insurer for a loss occurring before the date of the agreement, if such appear either from the policy or from cir-

<sup>323</sup> *People v. Dimick*, 107 N. Y. 13, 29, per Earle, J.

<sup>324</sup> *Paddock v. Franklin Ins. Co.*, 11 Pick. (Mass.) 227.

<sup>325</sup> *Blackhurst v. Cockell*, 3 Term Rep. 360. See, also, *Clement v. Phoenix Ins. Co.*, 6 Blatchf. (C. C.) 481; *Schroeder v. Stock and Mutual Ins. Co.*, 46 Mo. 174; *Mer. Ins. Co. v. Paige*, 60 Ill. 448; *Sutherland v. Pratt*, 11 Mees. & W. 236.

<sup>326</sup> *Andrews v. Marine Ins. Co.*, 9 Johns. (N. Y.) 32.

<sup>327</sup> *Horter v. Merchants' Mut. Ins. Co.*, 28 La. Ann. 730.

<sup>328</sup> *Hallock v. Commercial Ins. Co.*, 26 N. J. L. 268; *Commercial Ins. Co. v. Hallock*, 27 N. J. L. 645; 72 Am. Dec. 379; *Insurance Co. v. Folsom*, 18 Wall. (U. S.) 237.

<sup>329</sup> *Insurance Co. v. Folsom*, 18 Wall. (U. S.) 237, affirming 8 Blatchf. (C. C.) 170; 9 Blatchf. 201; 3 Kent's Commentaries, 259, note c; *Hammond v. Allen*, 2 Sum. (C. C.) 396; *Hooper v. Robinson*, 98 U. S. 537; 1 Phillips on Insurance, 8d ed., 501, sec. 925. See, also, sec. 104 herein.



cumstances to have been the intention of parties;<sup>330</sup> and extrinsic evidence is admissible to prove that a policy, dated on the same day on which an embargo was laid, was made without knowledge of the embargo.<sup>331</sup> And where the contract is made when both parties are ignorant of the loss, the policy may be valid and binding, although it is not delivered,<sup>332</sup> and so although the policy is post-dated.<sup>333</sup>

**§ 106. Where Both Parties Know of Loss When Contract is Made or Executed.**—Although in marine risks the policy may be upon property "lost or not lost," yet if the property has been totally lost and this is known by the parties, there is nothing to insure, no event to be indemnified against, no unknown event upon which to base the contract, and hence there can be in such case no lawful or valid insurance.<sup>334</sup> But if at the time the policy is executed a loss has occurred, and it is known to both parties, the contract will be binding if the risk has actually attached prior thereto.<sup>335</sup> And it is held that a binding contract may be made where the insurers know of the loss at the time the contract is entered into, and it appears that they intend to make themselves liable.<sup>336</sup> For if the amount of the loss is uncertain, there is no reason why the insurance should not attach.<sup>337</sup> Such intention where the loss is unknown is generally expressed by the words "lost or not lost." <sup>338</sup>

**§ 107. Knowledge of Loss by Assured Before and After Risk Attaches.**—Where a loss occurring before the risk

<sup>330</sup> *Security etc. Ins. Co. v. Kentucky etc. Ins. Co.*, 7 Bush (Ky.), 81; 3 Am. Rep. 301.

<sup>331</sup> *Lorent v. South Carolina Ins. Co.*, 1 Nott & McC. (S. C.) 505, 506.

<sup>332</sup> *Kohne v. Insurance Co. of North America*, 1 Wash. (C. C.) 93.

<sup>333</sup> *Mead v. Davidson*, 3 Ad. & E. 303; *Giffard v. Queen's Ins. Co.*, 1 Hann. (N. B.) 432; *Merchants' Ins. Co. v. Paige*, 60 Ill. 448; *Horter v. Merchants' Mut. Ins. Co.*, 28 La. Ann. 730.

<sup>334</sup> So held in *People v. Dimick*, 107 N. Y. 13, 29, per Earle, J.

<sup>335</sup> *Mead v. Davidson*, 3 Ad. & E. 303; *Davenport v. Peoria etc. Ins. Co.*, 17 Iowa, 276; *Walker v. Met. etc. Ins. Co.*, 56 Me. 371; 1 *Phillips on Insurance*, 3d ed., 502, sec. 926.

<sup>336</sup> *Arkansas Ins. Co. v. Bostick*, 27 Ark. 539. But see *People v. Dimick*, 107 N. Y. 14.

<sup>337</sup> 2 *Phillips on Insurance*, 3d ed., 502, sec. 926.

<sup>338</sup> *Mead v. Davidson*, 3 Ad. & E. 303; *Arkansas Ins. Co. v. Bostick*, 27 Ark. 539. See secs. 104 and 105, herein.

attaches is known only to the applicant and he obtains a policy without disclosing the fact of loss, the policy is void,<sup>339</sup> even though the contract be given a date prior to the loss.<sup>340</sup> If a person who has directed a marine insurance to be procured at a distant place receives intelligence of a loss before his order is executed, he should countermand the order, or transmit the intelligence by the earliest and most expeditious usual route of mercantile communication. But it is not obligatory on him to resort to an unusual and extraordinary mode of transmission. So where the Atlantic cable had been only about three months in operation, and the rates were high, it was held sufficient to send notice by the first mail from Liverpool to New York, where the insurer resided.<sup>341</sup> In an Illinois case a marine policy was obtained on goods lost or not lost, shipped on a vessel lost two days prior to the date of the policy; this loss was known to the insured at the time, but he failed to inform the agent, and it was decided that the particular agent effecting the insurance should have been informed; that knowledge by the company of the loss did not necessarily arise from the fact that the daily papers received at the company's office on the day the policy was issued contained a notice of the loss; and that notice to one agent of the company did not import necessarily a notice to the other.<sup>342</sup> In *Blake v. Hamburgh-Bremen Fire Insurance Company*<sup>343</sup> the agent agreed with the insured that he might obtain additional insurance, such insurance to take effect for an amount named in a letter from the time it was mailed. It was determined that the insurance could not be held to have attached from the mere posting of an unstamped letter, and that giving notice after the fire began, the insured knowing of such fact, was insufficient to bind the company.

<sup>339</sup> *Fitzherbert v. Mather*, 1 Term Rep. 12; *Laidlaw v. Liverpool etc. Ins. Co.*, 13 Grant (Ont.), 337; *Mackie v. European Ins. Co.*, 21 L. T., N. S., 102. See *Mittaker v. Farmers' Union Ins. Co.*, 29 Barb. (N. Y.) 312; *People v. Dimick*, 107 N. Y. 13.

<sup>340</sup> *Wales v. New York Bowery F. Ins. Co.*, 37 Minn. 106; 33 N. W. Rep. 322.

<sup>341</sup> *Snow v. Mercantile Mut. Ins. Co.*, 61 N. Y. 160.

<sup>342</sup> *Merchants' Ins. Co. v. Paige*, 60 Ill. 448.

<sup>343</sup> 2 S. W. Rep. (Tex.) 368; 67 Tex. 160; 60 Am. Rep. 15.

§ 108. **Assured is not Obligated to Notify Company of Loss before Delivery of Policy when Risk has Attached.** There is no legal nor moral obligation resting on the assured to voluntarily notify the company of a loss occurring after the risk has attached, although the policy has not been delivered nor the premium paid.<sup>344</sup> So where an application was accepted and the policy made out and executed, but was permitted to remain in the hands of the company, and the plaintiff, directly after the occurrence of a loss paid the premium and received the policy without disclosing the fact that the property had been burned in the meantime, it was determined that the company was liable and that upon receipt of the premium and delivery of the policy the contract related back to the date of the policy,<sup>345</sup> and in such case the policy will also relate back to the time when it was made out and signed, notwithstanding a provision in the by-laws that the policy should take effect on the day of approval and be binding thereafter "providing the premium has been paid, and not otherwise."<sup>346</sup>

<sup>344</sup> Keim v. Home Mut. F. Ins. Co., 42 Mo. 38; 97 Am. Dec. 291; American Home Ins. Co. v. Patterson, 28 Ind. 17.

<sup>345</sup> Baldwin v. Chouteau Ins. Co., 56 Mo. 151; 17 Am. Rep. 671. See, also, Commercial Mut. M. Ins. Co. v. Union Mut. M. Ins. Co., 19 How. (U. S.) 318.

<sup>346</sup> Keim v. Home Mut. F. Ins. Co., 42 Mo. 38; 97 Am. Dec. 291.

## CHAPTER V.

### REINSURANCE.

- § 112. Reinsurance defined.
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- § 135. When suit may be brought against reinsurer: Rights of original insured.
- § 136. Reinsurance: Recovery: Evidence.
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- § 138. Defenses available to reinsurer.

§ 112. **Reinsurance Defined.**—Reinsurance is a contract whereby one for a consideration agrees to indemnify another against loss or liability assumed by the latter as insurer of a third party. Other definitions have been given as follows: A contract "by which one insurer causes the sum which he has insured to be reassured to him by a distinct contract with another insurer, with the object of indemnifying himself against

his own responsibility.”<sup>1</sup> “Reinsurance is an indemnity against a risk incurred by the assured in consequence of a prior insurance upon the same property or some part of it.”<sup>2</sup> “A contract whereby one party, called the ‘reinsurer,’ in consideration of a premium paid to him, agrees to indemnify the other against the risk assumed by the latter by a policy in favor of a third party.”<sup>3</sup> “Reinsurance is where an insurer procures the whole or part of the sum which he has insured (i. e., contracted to pay in case of loss, death, etc.) to be insured again to him by another person. This is commonly done in case of marine insurance. . . . Formerly, by 19 George II., chapter 37, section 4, reinsurance was prohibited except in certain cases, but this provision was repealed by 30 and 31 Victoria, chapter 23.”<sup>4</sup> Sometimes, however, reinsurance exists where an insurer about to become insolvent, or for other reasons, transfers his risks to another company, or consolidates with some other company, and the transferee or consolidated company assumes all the risks.<sup>5</sup> Whether a contract is or is not one of reinsurance has been before the courts in several cases. It was held in New York that there was no contract of reinsurance, but simply an original insurance, where certain policies upon a mortgage interest were directed to be canceled, and the agent

<sup>1</sup> *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 312, 323, per Gray, J. See Deering's Annot. Civ. Code, Cal., secs. 2646-49; Levisse's Dak. Code, secs. 1559-62; Annot. Code Mont. (18 5), sec. 3530; Rev. Code N. Dak. 1895, sec. 4533.

<sup>2</sup> *Mutual Safety Ins. Co. v. Hone*, 2 N. Y. 235, 240, per Gardiner, J.

<sup>3</sup> 1 Phillips on Insurance, 3d ed., 209, sec. 374.

<sup>4</sup> Sweet's Dictionary of English Law (1882), 689. For other definitions, see *Commercial Ins. Co. v. Detroit F. & M. Ins. Co.*, 38 Ohio St. 15, 16; 11 Am. & Eng. Ency. of Law, 343; Rapalje & Lawrence's Law Dictionary, 1089, title “Reinsurance”; 1 May on Insurance, 3d ed., sec. 11; Deering's Annot. Civ. Code, Cal., sec. 2646; Comp. Laws, Dak. 1887, sec. 4183.

<sup>5</sup> *Johannes v. Phoenix Ins. Co.*, 66 Wis. 50; 57 Am. Rep. 249; *Glen v. Hope Mut. etc. Ins. Co.*, 56 N. Y. 379. “The insurance of the solvency of an insurer is permitted and practiced in some foreign countries (Le Guidon, c. 2, art. 20; Ord. Louis XIV., h. t. art. 20; Valin, h. t. 65), but it seems never to have been in use amongst us”: 1 Marshall on Insurance, ed. 1810, \*145; Emerigon on Insurance, Meredith's ed. 1850, c. viii, sec. 114, p. 205.

applied to defendant to reinsure the risks, which it agreed to do, but under a subsequent agreement the policies were issued directly to the insured.<sup>6</sup> The word "reinsurance" is sometimes used in the sense of a renewal insurance. Thus, where partnership property was insured by the defendants, and thereafter one of the partners having purchased the others' interest applied to defendant's agent for reinsurance, which was agreed to be effected; but the agent gave the latter a paper which he supposed was a policy and so did not examine it, but it was in fact only a renewal of the old policy, and the court held it a new contract, subject to the same terms and conditions as the first.<sup>7</sup>

**§ 113. Reinsurance—Nature of Contract.**—Although the decisions show a difference in many respects between the contract of insurance and reinsurance, yet the contract involves no legal principles essentially different from those applicable to contracts generally.<sup>8</sup> Nor does the contract necessarily differ in form from original insurance.<sup>9</sup> It is held that an agreement to reinsure is not a contract of guaranty.<sup>10</sup> As we have seen elsewhere, reinsurance is a contract of indemnity to the reinsured.<sup>11</sup> This rule, however, is qualified in Illinois to the extent that the amount paid by the reinsured to the insured is

<sup>6</sup> *Excelsior F. Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; 14 Am. Rep. 371.

<sup>7</sup> *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; 9 Am. Rep. 235.

<sup>8</sup> *Smith v. St. Louis Mut. L. Ins. Co.*, 2 Tenn. 727, 742.

<sup>9</sup> *New York Bowery F. Ins. Co. v. New York F. Ins. Co.*, 17 Wend. (N. Y.) 359; *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250, 253.

<sup>10</sup> *Bartlett v. Firemen's Ins. Co.*, 77 Iowa, 158; 41 N. W. Rep. 601.

<sup>11</sup> Sec. 28, herein. *Faneuil Hall Ins. Co. v. Liverpool etc. Ins. Co.*, 153 Mass. 67, 68, per Morton, J.; *Manufacturers' Ins. Co. v. Western Assur. Co.*, 145 Mass. 423, per Knowlton, J.; *Barnes v. Hekla F. Ins. Co.*, 56 Minn. 38; 57 N. W. Rep. 314; *Fame Insurance Company's Appeal*, 83 Pa. St. 398; *Bartlett v. Firemen's Ins. Co.*, 77 Iowa, 158; 41 N. W. Rep. 601; *Insurance Co. v. Insurance Co.*, 38 Ohio St. 15, 16; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443, 446; *Philadelphia Trust etc. Ins. Co. v. Fame Ins. Co.*, Phila. 9 (Pa.) 292 (a contract of indemnity against liability and not merely against damage); *Deering's Annot. Civ. Code, Cal.*, sec. 2648; *Dak. Comp. Laws 1887*, sec. 4185; *Leviasee's Dak. Codes*, secs. 1559-62; *Annot. Civ. Code Mon.*, 1895, sec. 3530; *Rev. Code, N. Dak.*, 1895, sec. 4535.

the measure of indemnity from the reinsurer.<sup>12</sup> We shall consider the force of this qualification hereafter.<sup>13</sup>

§ 114. **Reinsurance—Validity of Contract.**—Reinsurance was a valid contract at common law,<sup>14</sup> but in 1746 an act was passed<sup>15</sup> in England providing that it should not be lawful to make reinsurance unless the insurer should be insolvent, become a bankrupt, or die.<sup>16</sup> This statute remained in force till the act of 1864<sup>17</sup> was passed, providing that reinsurance of sea risks might lawfully be made. Reinsurances have always been valid and lawful in this country, and in an early Massachusetts case the court decides that the statute 19 George II., chapter 37, did not extend to the then British colonies here, and was not the law of that commonwealth.<sup>18</sup> It was held however, in a Maryland case<sup>19</sup> that the English prohibitory statute<sup>20</sup> was in force in that state, and related exclusively to marine reinsurance. Reinsurance is, however, not only a valid contract, but is now commonly practiced, and it is held that a parol agreement by the underwriter to transfer a risk to another is not within the prohibition of the statute 19 George II., chapter 37.<sup>21</sup>

<sup>12</sup> *Illinois Mut. Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362; 16 Am. Rep. 620. See, also, *Insurance Co. v. Insurance Co.*, 38 Ohio St. 11, 15, 16.

<sup>13</sup> See sec. 118, herein.

<sup>14</sup> *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 312, 323; *New York Bowery F. Ins. Co. v. New York F. Ins. Co.*, 17 Wend. (N. Y.) 359, 362; *Merry v. Prince*, 2 Mass. 176, 185.

<sup>15</sup> 19 Geo. II., c. 37.

<sup>16</sup> This act covered reassurances in England made in England either by British subjects or foreigners, whether on British or foreign ships: *Andree v. Fletcher*, 2 Term Rep. 161; 1 Marshall on Insurance, ed. 1810, \*144. See *Edgar v. Fowler*, 3 East, 118.

<sup>17</sup> 27 & 28 Vict., c. 56. See, also, 30 & 31 Vict., c. 23.

<sup>18</sup> *Merry v. Prince*, 2 Mass. 176, 185; *Hastie v. De Peyster*, 3 Caines (N. Y.), 190 b, 193; *New York Bowery F. Ins. Co. v. New York F. Ins. Co.*, 17 Wend. (N. Y.) 359, 362. This case holds that there is no difference between cases of fire and marine risks: *Insurance Co. v. Insurance Co.*, 38 Ohio St. 11, 16, 17; 43 Am. Rep. 413; *Merchants' etc. Mut. Ins. Co. v. Washington Mut. Ins. Co.*, 1 Handy (Ohio), 408, 425; *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 323.

<sup>19</sup> *Consolidated Real Estate etc. Co. v. Cashaw*, 41 Md. 59.

<sup>20</sup> 19 Geo. II., c. 37.

<sup>21</sup> *Delver v. Barnes*, 1 Taunt. 48.

**§ 115. Reinsurance—Validity of Company's Acts—Its Powers.**—An insurance company empowered "to make contracts of insurance," or "all kinds of insurance against losses by fire," may make a contract of reinsurance;<sup>22</sup> and where the act of incorporation of the F. company made it subject to the general laws of the state authorizing companies to "reinsure themselves," and the F. Company agreed to reinsure the E. Company on all its term risks in certain enumerated states, and to indemnify it upon all losses in one class not exceeding five thousand dollars, and in others known as "extra-hazardous," exceeding a certain sum, and to contribute in various proportionate amounts on another class of risks, and the losses were payable under a pro rata clause, and losses were sustained in the Chicago fire in 1871, it was held that the contract was not ultra vires, and would be enforced by a court of equity.<sup>23</sup> An insurance company having a controlling interest in another company may delay a statement demanded of the superintendent of insurance from the latter company, and may reinsure its risks and absorb its assets pro rata, and the assets of both companies being available to the superintendent and the reinsured company, which is solvent, the act of the reinsurer is neither a fraud against the state nor against public policy.<sup>24</sup> But the reinsurance of the policies and the transfer of the whole reserve of a solvent life insurance company to an insolvent company without security by managers who have bought the stock of the former under an agreement that its contract obligations shall be rigorously fulfilled to the same extent and in the same manner as if no change had taken place, is a breach of such contract obligations and of such agreement;<sup>25</sup> and where the intendment of a law was that insurance should be made in the name of and for the benefit of the company, and not individual policy holders, such law cannot be construed so as to allow reinsurance in favor of a policy holder, and thus bring it into conflict with a statute forbidding

<sup>22</sup> *New York Bowery F. Ins. Co. v. New York F. Ins. Co.*, 17 Wend. (N. Y.) 359, 363.

<sup>23</sup> *Fame Insurance Company's Appeal*, 83 Pa. St. 396.

<sup>24</sup> *Alexander v. Williams*, 14 Mo. App. 13.

<sup>25</sup> *Mason v. Cronk*, 125 N. Y. 496; 35 N. Y. 859; reversing 27 N. Y.



a corporation giving preferences.<sup>26</sup> In Iowa it is held that a contract by a mutual benefit society, by which it agrees to assume the liabilities and death losses of another association, is ultra vires and void.<sup>27</sup> An agreement by which one life insurance company transfers to another all its assets in consideration that the latter company will reinsure the risks and assume the debts and liabilities of the former company, is ultra vires and void, although the vendor company is authorized to reinsure its risks,<sup>28</sup> and a policy holder in the reinsured company who has paid premiums to the transferee company without such latter company issuing a new policy to him is entitled to recover from the reinsurer the premiums so paid, with interest thereon.<sup>29</sup> So the right of a mutual life insurance company to reinsure does not carry with it the power to sell or transfer all its property against the will of the minority of its policy holders, and a contract to so sell or transfer is ultra vires and void as against the dissenting policy holders.<sup>30</sup> Again, where a majority of the policy holders of a reinsured company assented to the transfer of the assets to the reinsuring company, it was held that the court might decree that all the securities deposited as a trust fund be given to those policy holders who had neither expressed assent nor dissent.<sup>31</sup> But a failure to comply with a state law requiring a certain amount of capital as a condition precedent to doing business, will not prevent an insurance company from indemnifying itself by reinsurance against risks already assumed.<sup>32</sup>

**§ 116. Reinsurance not Within Statute of Frauds.** Reinsurance is not a contract within the statute of frauds, and is not a promise to pay the debt of another, and need not be in

<sup>26</sup> *Casserly v. Manners*, 48 How. Pr. (N. Y.) 219.

<sup>27</sup> *Twiss v. Guaranty L. Assn.*, 87 Iowa, 733; 55 N. W. Rep. 8; 22 Ins. L. J. 539.

<sup>28</sup> *Smith v. St. Louis Mut. L. Ins. Co.*, 2 Tenn. Ch. 727.

<sup>29</sup> *Smith v. St. Louis Mut. L. Ins. Co.*, 2 Tenn. Ch. 727.

<sup>30</sup> *Price v. St. Louis etc. L. Ins. Co.*, 3 Mo. App. 262; see *Barden v. St. Louis etc. L. Ins. Co.*, 3 Mo. App. 248.

<sup>31</sup> *Relfe v. Columbia L. Ins. Co.*, 10 Mo. App. 150.

<sup>32</sup> *Davenport F. Ins. Co. v. Moore*, 50 Iowa, 619.

writing.<sup>33</sup> Notwithstanding the above rule, it is held in *Egan v. Fireman's Insurance Company*<sup>34</sup> that if one insurance company assumes the policies of another, that such agreement cannot be enforced unless in writing, as it is a promise to pay the debt of another.

§ 117. **Relations between Parties and between Insured and Reinsurer.**—The reinsured sustains as to the reinsurer the same relation which the original insured bears to the reinsured, but the contract of reinsurance does not inure to the benefit of the assured, and he has no claim, legal or equitable, against the reinsurer,<sup>35</sup> nor any interest in the contract.<sup>36</sup> There is no privity of contract between them, and the reinsured remains solely liable on the original insurance, and he alone has a claim against the reinsurer.<sup>37</sup> Nor can the insured claim a right to share in the assets in case of reinsurance where he has not paid for ten years, on the ground that the reinsurance excused such payment;<sup>38</sup> and in case of insolvency of the reinsured and a recovery in full against the reinsurer, the insured has no claim against the reinsured over the per cent received from him.<sup>39</sup> Notwithstanding this rule, we are inclined to agree with Mr. Parsons that the statement that assured has no claim on such funds is "too sweeping, but that his claim is one in common with other creditors."<sup>40</sup> The rule that there is no

<sup>33</sup> *Bartlett v. Fireman's Fund Ins. Co.*, 77 Iowa, 155; 41 N. W. Rep. 601. See *Connecticut Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318.

<sup>34</sup> 27 La. Ann. 368.

<sup>35</sup> *Herckenrath v. American Mut. Ins. Co.*, 3 Barb. Ch. (N. Y.) 63; 1 Barb. Ch. (N. Y.) 363.

<sup>36</sup> *Delaware Ins. Co. v. Quaker City Ins. Co.*, 3 Grant's Cas. 71; *Faneuil Hall Ins. Co. v. Liverpool etc. Ins. Co.*, 153 Mass. 67, 68, per Morton, J.; *Deering's Annot. Civ. Code, Cal.*, sec. 2649; *Comp. Laws, Dak.* 1887, sec. 4186; *Annot. Civ. Code, Mon.*, 1895, sec. 3533; *Rev. Code, N. Dak.*, 1895, sec. 4536.

<sup>37</sup> *Strong v. Phoenix Ins. Co.* 62 Mo. 289, 296, 297; 21 Am. Rep. 417; *Barnes v. Hekla F. Ins. Co.*, 56 Minn. 38; 57 N. W. Rep. 314; *Hastie v. De Peyster*, 3 Caines (N. Y.), 190 b.

<sup>38</sup> *Re Empire Mut. L. Ins. Co.*, 64 How. Pr. (N. Y.) 51.

<sup>39</sup> *Consolidated Real Estate & F. Ins. Co. v. Cashaw*, 41 Md. 59, 74.

<sup>40</sup> He says (1 May on Insurance (Parsons), sec. 11 A): "The assured has no distinctive claim on those funds, no claim different from that of

privity of contract between the insured and the reinsurer is subject, however, to such exceptions as may arise from the agreement of the parties, as where the contract provides that the assured may sue the reassurer;<sup>41</sup> or in case of transfer of its business and consolidation of the insurer with another company, the reinsurer becomes directly liable, or where the reinsurer assumes all risks and liabilities of the insurer here, the insured may sue the reinsurer.<sup>42</sup>

**§ 118. Insurable Interest of Reinsurer.**—The fact that the insurer has assumed a risk gives him an insurable interest.<sup>43</sup> The relation which the reinsured sustains to the property at risk, as the original insurer thereof, gives an insurable interest.<sup>44</sup> Insurers, however, have no insurable interest in the property insured by them, regarded in the light of owners.<sup>45</sup> It is not necessary to specify in the policy that the interest is a reinsurance, although the nature of the contract would make it advisable so to do for practical reasons.<sup>46</sup>

any other creditor of the insolvent company, but in common with the other creditors he did have a claim. . . . The claim against the receiver was part of the assets in the hands of the receiver to be administered for the benefit of creditors." This statement of Mr. Parsons refers to words of the court in the case of Consolidated Real Estate etc. Co. last above cited, and quoted by him as follows: "The original insured has no claim in respect of the money so paid."

<sup>41</sup> *Glen v. Hope Mut. L. Ins. Co.*, 56 N. Y. 379.

<sup>42</sup> *Fischer v. Hope Mut. L. Ins. Co.*, 69 N. Y. 161; *Glen v. Hope Mut. etc. Ins. Co.*, 56 N. Y. 37; *Johannes v. Phoenix Ins. Co.*, 66 Wis. 50; 57 Am. Rep. 248; *Barnes v. Hekla F. Ins. Co.*, 56 Minn. 38; 57 N. W. Rep. 314.

<sup>43</sup> *New York Bowery Ins. Co. v. New York F. Ins. Co.*, 17 Wend. (N. Y.) 359; *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250; *Yonkers etc. Ins. Co. v. Hoffman*, 6 Rob. (N. Y.) 316; 1 Phillips on Insurance, 3d ed., 209, sec. 375.

<sup>44</sup> *Manufacturers' Ins. Co. v. Western Assur. Co.*, 145 Mass. 423, per Knowlton, J.

<sup>45</sup> *Alliance M. Ins. Co. v. Louisiana State Ins. Co.*, 8 La. 1; 28 Am. Dec. 117.

<sup>46</sup> This question is considered in 1 Phillips on Insurance, 3d ed., 270, secs. 498, 499, and he concludes: "That an assured may effect reinsurance directly on the insured subject against the risks or any part of the risks insured against in the original policy, without any disclosure in the policy, or otherwise, that it is a reinsurance"; but he adds: "A practical objection may arise unless a reinsurance is expressed to be

§ 119. **Reinsurance—The Risk.**—The insurer may reinsure all or part of the risk or liability he has assumed,<sup>47</sup> whether the perils be of the sea or fire,<sup>48</sup> but the same subject matter or peril is implied as in the original, but it need not be the same specific risk,<sup>49</sup> for the contract of reinsurance covers only the insurable interest or liability of the original insurer, and extends no further than the risk taken by it; it cannot stipulate for indemnity against a risk which it has not assumed.<sup>50</sup> So where the original insurance covers a certain voyage, there can be no indemnity for a different voyage under the contract of reinsurance, although the policy for reinsurance is made “subject to such risks, valuations, and conditions, including the risk of premium note, as are or may be taken” by the insurer.<sup>51</sup> And where a reinsurance policy was by its terms equally applicable to two charters, both of which were known to the reinsuring company, such policy will be presumed to refer to the charter on which the insured company had issued its policy, and which the evidence shows was the one intended.<sup>52</sup> Although the contract of reinsurance applies to the subject matter of insurance specified in the original policy and to risks of the same kind, the risk need not be identical, and this is the law, in the absence of special stipulations except such as have no application to reinsurance, and the words “subject to coinsurance clause,” in the application of the reinsured company, may constitute a material part of the description of the risk upon which reinsurance is sought, and so affect the liability of the reinsurer.<sup>53</sup>

such in the policy . . . on account of the usual stipulations . . . relative to notice of prior and subsequent insurance, . . . which renders it expedient for both parties that it should be so expressed”; citing *Hone v. Mutual S. Ins. Co.*, 1 Sand. (N. Y.) 137; *Mutual S. Ins. Co. v. Hone*, 2 N. Y. 235.

<sup>47</sup> 1 Phillips on Insurance, 3d ed., sec. 376.

<sup>48</sup> *New York Bowery Ins. Co. v. New York F. Ins. Co.*, 17 Wend. (N. Y.) 359.

<sup>49</sup> *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250.

<sup>50</sup> *Commonwealth Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. St. 475.

<sup>51</sup> *Commonwealth Ins. Co. v. Globe Mut. Ins. Co.*, 35 Pa. St. 475.

<sup>52</sup> *Ocean Ins. Co. v. Sun Mut. Ins. Co.*, 15 Blatchf. (C. C.) 249.

<sup>53</sup> *Royal Ins. Co. etc. v. Home Ins. Co.*, 15 C. C. A. 609; 68 Fed. Rep. 698. McCormick, C. J., says: “The appellee—the Home Ins. Co.—ap-  
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**§ 120. Duration—Term of Risk may be Controlled by Original Insurance.**—This is illustrated by a Pennsylvania

plied to the appellants for reinsurance, and received the respective policies, which are the subjects of the litigation. The applications to the Royal were made on printed forms, with certain blanks filled in in writing. The application to the Imperial does not appear to have been in writing, but was substantially the same in effect as those made to the Royal, the features of which material to note here were and are that the applicant warranted to retain twenty-five thousand dollars, and described the property applicant had insured as 'cotton subject to coinsurance clause.' The Royal has now abandoned any contention on the retention clause. The Imperial still insists on its construction of that clause, but the proof abundantly supports the action of the circuit court on the issues made on the warranty by the Home to retain twenty-five thousand dollars or more on the risk. During the life of these policies of coinsurance a large amount of the cotton was destroyed by fire. At the time of the fire the appellee had written, and in force on the cotton, subject to the fire, policies with the coinsurance clause to the amount of ninety-seven thousand seven hundred dollars and policies without the coinsurance clause to the amount of twenty-five thousand dollars. The loss on the cotton covered by the first-named class of these policies was thirty-eight thousand seven hundred and seven dollars and fifty-eight cents, and the loss on the other exceeded the amount of the policies. There is substantially no issue as to what were the actual facts as to the contracts and the loss, and there can be no dispute that if the contention of the appellee as to the construction of the contract of coinsurance is correct, the decree of the circuit court should be affirmed. Having found that its construction of the retention clause is correct, it only remains to consider the other clauses of the policies on which issue is joined. The judgment and decree of the circuit court construe these clauses in favor of the appellee, and a majority of the judges of this court concur in that decision. The questions here involved are so well stated, and the authorities, so far as any authority exists, bearing on the question are so well applied in the brief of counsel for appellee, that, in justice to ourselves and to him, we must adopt and use his reasoning almost literally, and substantially to the full extent that he has advanced it, there being left little or nothing to add to or qualify what he had said, viz: It is urged that the defendants are not liable for the losses paid by the plaintiff to F. and B. because the policies issued to them did not contain the coinsurance clause. It is urged that the two slips pasted on the policies of reinsurance are descriptive of the risk assumed by the reinsurer. The defendants are driven to take this ground because the reinsurer has insured the liability of the original insurer, whatever that be, unless in the contract of reinsurance there can be found some clause whereby the reinsurer stipulated that it assumed no risk, unless the original contract contained the coinsurance clause. It is observed that the policies of reinsurance bear the following dates: That of the Imperial is dated Nov. 23, 1891, and those of the Royal Nov. 12, '91 and Dec. 26, '91; the F. and B. policies are dated Oct. 12, '91,

case, where the duration of the reinsurance was stated as for one year, but the policy did not mention when that period was

Nov. 19, '91, Feb. 9, '92, Feb. 11, '92, and Feb. 26, '92. Only one of the policies is dated before those of the Royal, and only two are dated before that of the Imperial. Three of them are dated after all the policies of reinsurance were issued. The description of the risk in the reinsurance policies is that the Home are insured on ten thousand dollars of their liability as insurers under their various policies issued to various parties for various amounts, and covering as follows: Ten thousand dollars on cotton in bales, their own or held by them in trust or on commission, while contained in the yard No. 1, Shippers' Press, New Orleans. A part of this description is clearly inapplicable to the reinsurance, for the words, 'their own or held in trust or on commission,' have no meaning as between the insurer and the reinsurer. The cotton itself was not the subject of reinsurance as between the insurer and reinsurer, but as between them the subject of the insurance was the liability of the insurer, as an insurer, on the cotton, owned or held by the original insured. This policy was issued for a year, and to cover any liability that the insurer, during the year, might assume as insurer of cotton in the designated press. It was not restricted to a liability then existing, but extended to future liability which might be incurred by the Home on cotton in the Shippers' Press-yard 1. What was the stipulation as to the risk assumed by the reinsurer? He agreed to cover any risk which the insurer might be willing to take, for that is the meaning of the words, 'This policy to be subject to the same risks, conditions, etc., as are or may be assumed by the reinsured, and the loss, if any, payable pro rata at the same time and in the same manner as by said company, etc.' Any printed stipulation having reference to the property itself or the cash value thereof cannot be applied to the contract of reinsurance between the reinsurer and the reinsured, because the property is not the subject matter of their contract. It is true that the contract of reinsurance must apply to the subject matter of insurance specified in the original policy; that is to say, to cotton in press-yard 1, and to risks of the same kind as those specified in the original policy. In other words, if the original policy is a contract of insurance against loss by fire, the reinsurance must be against loss by fire, and not against loss by storms on land or at sea. But the specific risk in the policy of reinsurance need not be identical with that in the original policy; that is to say, an original insurance may be effected for six months, with use of all ports of the world, except those of Texas. The reinsurance may be for a single voyage within bounds not prohibited and for a less amount: *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250. Such is the law in the absence of stipulations contained in the lower printed slip annexed to the policies sued on. That slip provides that this policy is to be subject to the same risks, conditions, etc., that are or may be assumed by the original insurer. Hence reinsurance, under these policies, is reinsurance against any of the fire risks assumed by the original insurer in any of its policies on cotton in Press-yard 1, and on the same conditions as those contained in any of the original policies issued by

to commence or terminate. The original insurance was for one year from February 24th, with privilege of

the original insurer to the original insured on cotton thus located. This clause gives to the original insurer the privilege of taking such risks on cotton in the designated place as it may choose. The reinsurer says: 'I will reinsure whatever contract you make, and, to protect me from any imprudence on your part, you must retain at least twenty-five thousand dollars on the same risk.' This view is taken by the supreme court of Massachusetts in *Manufacturers' Fire etc. Ins. Co. v. Western Assur. Co.*, 145 Mass. 424, 14 N. E. Rep. 632. The court said: 'It is often doubtful how far provisions which relate to the conduct of an insured person, as general owner of that which is the subject of the contract, shall be given effect in a policy to indemnify against a risk which the insured has taken on the property of another. The nature of the risk against which it insured, if there was no special stipulation regarding it, would suggest troublesome questions with reference to the applicability of these provisions of this peculiar kind of insurance, some of which it might be necessary to decide.' But in connection with the statement of the risk, the following sentence was inserted, which relieves the court of this difficulty: 'This policy to be subject to the same risks, conditions,' etc., 'as are or may be assumed or accepted by the insured company,' etc. The language of the clause is almost identical with the language used in the lower slip or rider attached to the policies sued on in these cases. The court said: 'By this language the defendant bound itself by what had been done and by what might be assumed by the plaintiff, properly pertaining to the risk which it was reinsuring. This agreement rendered nugatory many printed portions of the policy in which it was inserted. This was special and peculiar, pertaining directly to the subject matter of the contract, and it controlled those parts of the policy which were inconsistent with it. It assumed knowledge on the part of the defendant of all the terms and conditions of the plaintiff's policy, and it implied that the plaintiff, as original insurer, might properly assume risks, conditions, etc., without materially changing the nature of the liability created by the original policy.' This was a case of reinsurance of a risk on a factory which had been assumed by the reinsured company, and the number of the policy designating the risk was inserted in the contract of reinsurance. The court of appeals of New York, in the case of *Jackson v. Insurance Co.*, 99 N. Y. 129, 1 N. E. Rep. 539, confirms the doctrine of the Massachusetts court. Justice Danforth says: 'The reinsurers had no property right in the subject insured by them, but, by underwriting the policy, rendered themselves liable to loss by fire, and they thereby acquired an insurable interest to the extent of that liability. But it was in relation only to the peril against which they had insured. It is that to which their request for reinsurance applied. By it, in effect, they say as insurers: 'We have undertaken a risk as follows: It amounts to four thousand five hundred dollars, and we ask indemnity against a portion of it.' It is not pretended that they did not state the risk literally as they had taken it, and it was, in fact, described in their policy

renewing, and the reinsurance was taken out May 31st of the ensuing year, and it was decided that the reinsurance

in terms similar to those used in the policy of reinsurance." The case may indeed be taken in like manner as if they had exhibited to the defendants the original policy, and the defendants had indorsed upon it an assumption of the risk of one thousand five hundred dollars. In both these cases the reinsurance applied to a specific original policy of insurance, designated by number in the contract of reinsurance. In these cases the original contract of insurance had been made before the reinsurance contract. In this case most of the original insurance was subsequent to the contract of reinsurance, and none of the policies of insurance originally issued prior to the contract of reinsurance are designated by numbers or otherwise. The original policies are not only not described in the contract of reinsurance, but the contract covers a period of one year, and it contemplated subsequent insurance. It also contemplated that existing policies might expire and new policies be made. Other insurance was permitted by the reinsurer. How was it possible to describe these future contracts of insurance intended to be covered by the reinsurance? They could not be described except as to the species of property and their locality, and therefore the reinsurer said to the reinsured: 'We will protect you against any loss on the cotton in Shippers' Press-yard 1 which you may assume as insurer, and we agree to accept the terms and conditions you may make with your customers, but you must retain, as insurer, a liability of at least twenty-five thousand dollars on the risk which we take, though we permit you to take other reinsurance, and, in case of loss, we fix the proportions in which we are to make payment. For that purpose we put in the following stipulation: This policy to be subject to the same risks as are or may be assumed by the reinsured company, and any loss payable pro rata at the same time and in the same manner as by said company,' etc. The court of appeals of New York says, in *Blackstone v. Insurance Co.*, 56 N. Y. 107, that by virtue of this clause the defendant is not bound to pay the full amount reinsured by its policy, but only such proportion of the amount of the loss as is in the ratio of the amount of reinsurance to the amount originally insured. Thus, the defendant's reinsurance being for half the amount of the original insurance, the defendant is to pay half the loss. The agreement to pay pro rata with the original insurer whatever liability may be assumed is entirely inconsistent with the clause providing for a different basis of liability, and it has no application to reinsurance, which does not cover property, but covers only the insurable interest of the reinsured growing out of his liability as insurer. In the Massachusetts case (145 Mass. 424; 14 N. E. Rep. 632) it was held that the clause requiring the written consent of the company to a change in the title or possession of the property insured had no application to the reinsurer, and no notice of such change need be given to him. It sufficed if such change was assented to by the original insurer. In *Uzielli v. Insurance Co.*, 15 Q. B. 13, it was held that the reinsurer was not entitled to notice of abandonment, though the primitive insured may have abandoned to his insurer. The court quotes



should be construed as running one year from the date February 24th, that being the date of commencement of the original

Phillips on Insurance and *Hastie v. De Peyster*, 3 Caines, 196. In that case Chief Justice Kent says: 'The reinsurer has no connection or concern with the first insurance, and is at all times bound to indemnify his own assured when the other can show that he has been damnified in consequence of the first insurance.' Mr. Justice Livingston says there was no privity at all between the primitive insured and the reinsurer. In the *Uzielli* case it was held that the suing and laboring clause in an original insurance policy and in the policy of reinsurance has no application to reinsurers. That clause provides that in case of loss or misfortune it shall be lawful for the assured, his agents, etc., to sue, labor, and travel in and about the safeguard, defense, and recovery of goods, etc., and the ship, without prejudice to this insurance, to the charges whereof the insurers agree to contribute. In that case the reinsurance was for one thousand pounds, but the loss as between the insurer and the assured was one hundred and twelve per cent, because the loss was eighty-eight per cent, and the expenses incurred, when added to the loss, made the original insurer responsible for one hundred and twelve per cent; that is to say, eighty-eight per cent of the loss, plus the expenses. The court said: 'The plaintiffs seek to recover eighty-eight per cent which the French company have paid for a total loss, and they seek to recover more under the suing and laboring clause in the policy. Now, in the policy sued on, the ship, as between the plaintiffs and the defendants, is insured at one thousand pounds. The policy itself is declared to be a reinsurance, and also it contains the suing and laboring clause. If it were not for the clause whereby the defendants were rendered subject to the same terms and conditions as were contained in the original policy, and were to pay as might be paid thereon, the plaintiffs, in my opinion, would be entitled to recover only eighty-eight per cent, etc. The plaintiffs rely, however, upon the special clause, whereby the defendants have undertaken to pay as the French company shall have paid, and under this clause they are entitled to recover any sum not exceeding one thousand pounds.' This special clause referred to is in the main similar to that contained in the lower slip of the policies sued on. The defendants in this English case were reinsurers of the French company, which itself was a reinsurer of English underwriters. In this case it will be observed that though the suing and laboring clause was a part of the policy of reinsurance, the court held it had no application to the reinsurers. Why? For no other reason than that the reinsurer does not insure the owner of the ship, but the insurable interest of the insurer. Hence that interest is the loss that the insurer might suffer under the policy issued by him, and the master of the rolls said the suing and laboring in that case for the safeguard of the ship was not by the assured under the policy of reinsurance, but by the assured under the original policy, for the ship was not insured under the reinsurance policy. So totally distinct is the original insurance from the reinsurance, that the premium of reinsurance may be less or greater than that of the

risk, and that the reinsurer was liable, the death of the insured having occurred between February 24th and May 31st.<sup>54</sup> So

original insurance, as well as the extent of the risk. The most instructive case on the subject is the most recent—*Faneuil Hall Ins. Co. v. Liverpool etc. Ins. Co.*, 153 Mass. 70; 26 N. E. Rep. 244. The reinsurance policy in that case contained a clause similar to that in the lower slip attached to the policies sued on, to wit: 'This policy is subject to the same risks, conditions, mode of settlement, and, in case of loss, payable at the same time and in the same manner as the policies reinsured.' The court said that many of the provisions in the printed blank would be inapplicable, and quotes one provision at the very commencement of the blank, viz: 'This company shall not be liable beyond the actual value of the insured property at the time of any loss or damage.' This, said the court, does not measure the defendant's liability under the contract of indemnity. Under that it may be liable, not only for the original loss, but for the costs and expenses incurred by the German company in defending itself against Chauncey's suit. Again, in speaking of the provision quoted above, the court says: 'We think this provision means, not that the various terms in the reinsured policy as to risk, etc., and time and mode of payment in case of loss are incorporated with, and form part of, the contract for indemnity—so that, for instance, claims by the plaintiff on the defendant here be settled by arbitration, or the plaintiff shall submit its books to the inspection of the defendant, or shall bring suit within one year—but that the reinsured or original policies furnish in these and other particulars the basis upon which the contract of indemnity stands, and that in all dealings with the original insured the provisions of the policy issued to him are to be observed.' The object of the coinsurance clause is to make the owner of the property carry a part of the risk, unless he insures to the full value of his property. The purpose is to compel the owner to take out policies to the full value of the property, and pay premiums on such full value, whereas the retention clause in policies of reinsurance is intended to discourage and prevent full reinsurance, and is, in fact, a coinsurance clause as between the reinsured and his reinsurer, for the retention clause is a contract between the insurer and his reinsurer that the original insurer will not effect reinsurance to the extent of his entire liability, but will carry himself a part of that liability, and the part to be carried was fixed in this case as not less than twenty-five thousand dollars. Hence the retention clause, the coinsurance clause, as between the reinsured and the reinsurer, is intended to accomplish an object totally different from the object intended to be secured by the coinsurance clause in the primitive policy issued to the insured. It is, therefore, plain that the clause in the upper slip or rider attached to the policies of reinsurance has no application to reinsurance. That clause provides 'that this company shall be liable for only such proportion of the whole loss as the sum hereby insured bears to the cash value of the property hereby insured.' No property whatever is insured by

<sup>54</sup> *Philadelphia L. Ins. Co. v. American L. & H. Ins. Co.*, 23 Pa. St. 65.

the terms of the original policy may control the contract of reinsurance.<sup>55</sup>

the reinsurer. His policy applies to a liability of the original insurer, arising out of his insurance of the property, and this liability is the incorporeal subject matter of the reinsurance contract, and is collateral to the property. If the above-quoted clause were applicable to reinsurance, the liability of the Imperial company on its policy for ten thousand dollars would be only eight hundred and thirty-three dollars and thirty-three cents, or one-twelfth thereof, inasmuch as the amount insured (ten thousand dollars) is one-twelfth of one hundred and twenty thousand dollars, which sum, for the purpose of illustration, is assumed to be the total value of the cotton insured. This result is almost absurd in the face of an agreement contained in the policy of reinsurance that 'this company will be liable, in case of reinsurance, for the loss sustained only in the proportion which the sum reinsured shall bear to the whole sum covered by the reinsured company.' Besides, there is an express pro rata clause in the lower slip attached to the policy which provides for pro rata payments to be made by the reinsurer at the same time and in the same manner as by the Home company. It is apparent, therefore, that in case of reinsurance the value of the property is abandoned as a test of proportionate liability, and in place thereof is substituted the proportion which exists between the amount of insurance carried by the reinsurer and the total amount of insurance carried by the original insurer. This is necessarily the case, as the property is not insured by the reinsurer; the liability of the original insurer in respect to the property, being the subject matter of the reinsurance contract. The coinsurance clause cannot be said to be descriptive of the risk, as between the reinsured and the reinsurer, because the risk which the reinsurer takes is the risk described in the original policy, whatever that may be, unless some clause can be found in the reinsurance contract which expressly varies that description. We find no clause in the reinsurance policies which modifies the risk as assumed by the original insurer. The complaint is not that any clause in the reinsurance policy has been violated by the Home company, but that the Home company did not insert the coinsurance clause in its contract with the primitive insured. This reduces the case to one of misrepresentation or concealment. No averment in the answers is made on which such a defense can be based. Indeed, such a defense is inconsistent with the answers, which assert that the coinsurance clause is contained in the policies sued on, and treat as such that part of the policy which declares that the insurer shall be liable for only such part of the whole loss as the sum insured bears to the cash value of the whole property at the time of the fire. The answers insist that all the terms of the contract between the parties are to be found in the policies of reinsurance. We need not therefore go beyond these policies to determine the rights of the parties, and hence no case of concealment or misrepresentation is presented by the pleadings. The defendants claim that the

<sup>55</sup> Commonwealth Ins. Co. v. Globe Mut. Ins. Co., 35 Pa. St. 475.

**§ 121. Custom of Underwriters may Affect Risk.—**  
Where the custom among underwriters in the city of New Or-

clause just quoted is the coinsurance claim and that their liability is for only 'such proportion of the whole loss as the sum insured bears to the cash value of the whole property insured. It appears to us that this clause has no application to reinsurance and is inconsistent with the pro rata clause which provides that the reinsurance is subject to the risk specified in the original policy, and that the reinsurer is to pay the loss pro rata with the reinsured. It is urged that one of the applications for reinsurance expressly asks for reinsurance subject to coinsurance, and appellants insist that this is not only a material, but the most material, of the descriptions of the risk, because when these contracts of reinsurance were made, the market rate at New Orleans upon policies on cotton containing the coinsurance clause was one per cent, while those not containing such clause commanded a premium of one one-half per cent. Let us see: F. and B. had—to use round numbers—sixty thousand dollars' worth of cotton. They lost thirty thousand dollars' worth. On this they had twenty-five thousand dollars of insurance without the coinsurance clause, for which they paid one and one-half per cent premium, or three hundred and seventy-five dollars, and got twenty-five thousand dollars on these policies. Now, on that property and that amount of loss, how much coinsurance must they have had to get twenty-five thousand dollars indemnity? That received was five-sixths of the loss. To have received a like amount under coinsurance policies they must have had policies written nominally for five-sixths of the value of the property insured; that is to say, to the amount of fifty thousand dollars, which, at one per cent, would have cost them five hundred dollars, instead of three hundred and seventy-five dollars. This is basing our calculations on the facts of the case. The proof shows that Mr. B. is a director in the Home company, and that he would not accept coinsurance policies on his cotton at risk. It shows that another firm of cotton factors, who took more insurance in the Home on cotton than all other persons combined, would not take coinsurance policies. It is not contended that they are not as binding according to their terms as other policies, or that they present any difficulty in the matter of adjustment. We incline to think that those who preferred policies without the coinsurance clause were justified in resting their choice on the knowledge they had that such insurance was the cheapest. Therefore, in addition to the reasoning of appellee's counsel which we have above adopted, we suggest that, considered as a representation, the materiality of the words, 'subject to coinsurance,' is not made to appear by the proposition which we have quoted from the brief of appellant's counsel, which is the proof text of their discourse. It seems to be clear that the purpose of the coinsurance clause is to stimulate full insurance. This being the chief object, insurance companies cannot claim that it lessens the moral hazard. It cannot affect the physical hazard. The fact that some of the appellee's policies did not have the coinsurance clause cannot, therefore, be relied on as a concealment, though 'all the authorities concerning matters of insurance

leans was to divide the risk, and not take the whole of it, such a custom will be understood, although not mentioned in the application.<sup>58</sup> If a contract of reinsurance is made by parties with reference to a custom that such contracts are to take effect from the time when granted, such custom will govern and the reinsurer is not liable for a loss of which neither party had knowledge, but which occurred prior to said time. "In the present case we find no circumstance indicating the mutual intention of the parties to give to their contract a retrospective effect. The stipulated facts show that at all the times mentioned it was the custom among fire insurance companies doing business upon the Pacific Coast, granting reinsurance to other fire insurance companies, to charge and collect premiums as and from the date of reinsurance, and to write their policies so as to cover the reinsured company from the date upon which the reinsurance would be granted. Both plaintiff and defendant were fire insurance companies, doing business in San Francisco, and may be presumed to be familiar with these customs, and, in the absence of a showing to the contrary, to have contracted with reference to them. Indeed, plaintiff alleges, in effect, that its contract with defendant was subject to the customs in vogue, and understood by insurance men, when it avers that defendant 'did agree to and did reinsure plaintiff

concur in the position that, if the concealment is material, it will avoid the policy, notwithstanding the insured did not intend to commit any fraud. The *suppressio veri* may happen by mistake and be entirely without fraudulent intention; still the underwriter is deceived and the policy is thus void for the very plain reason that the risk run is really different from the risk understood and intended to be run at the time of the agreement. A concealment which is only the effect of accident, inadvertence, or mistake is equally fatal to the contract as if it were designed. The principle is that, if the party proposing insurance conceals anything which may influence the rate of premiums which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. By a 'material fact' is meant one which, if known by the underwriter, would induce him either to decline the insurance altogether, or not to accept it unless at a higher premium': Angell on Insurance, sec. 175. Within the meaning of the authorities, it was not material, even if it can have relation to the contracts of reinsurance here involved. The decree of the circuit court in each case is affirmed." Pardee, C. J., dissented from the above opinion.

<sup>58</sup> Louisiana Mut. Ins. Co. v. New Orleans Ins. Co., 13 La. Ann. 246.

thereon in said sum, and did agree to issue to it a policy of reinsurance in the usual form, and for the premium usually chargeable upon risks of the character assumed.' Where there is a known usage of trade, persons carrying on that trade are held to have contracted with reference to the usage, unless the contrary appears, and the usage forms a part of the contract.<sup>57</sup> Without pursuing the authorities further, we are of opinion: 1. Where the exact time of the commencement and termination of the risk are specified in the policy, or, if no policy has been written, in the contract, such specification governs; 2. Where no time has been expressly indicated, the circumstances of the case will be considered for the purpose of determining it; 3. If there are no circumstances indicating the intention of the parties, and no time is specified in the contract, the risk will be deemed to have commenced at the date of the contract; 4. In the case last mentioned, if before the contract of insurance is made, the property has ceased to exist, although unknown to the parties, the risk never attaches."<sup>58</sup> .

**§ 122. Limitation of Risk of Specified Date—Change of Risk.**—If a policy of reinsurance covers by limitation only risks existing at a specified date, in such case a subsequent alteration or change in the risk by the original insured, even with the consent of the original insurer, releases the reinsurer.<sup>59</sup> If the reinsurance is made subject to all the conditions of the original policy, which are or may be adopted by the insurer therein, the reinsurer binds itself by what the insurer adopts within the terms of the original contract, and where the original policy is conditioned to be void in case of a change of ownership of the property, without consent of the insurer, and the reinsurance is made subject to such condition, the insured need only be required to look to the insurer for consent to such change.<sup>60</sup> The court said in this case: "When Marden wished to transfer his policy, that (the original insurer) was the company for him to go to. The policy provided that he

<sup>57</sup> Citing *Brown v. Howard*, 1 Cal. 423; *Taylor v. Castle*, 42 Cal. 367; *Anzerais v. Nagles*, 74 Cal. 60; 15 Pac. Rep. 371.

<sup>58</sup> *Union Ins. Co. v. American F. Ins. Co.* (Cal. 1895); 40 Pac. Rep. 431.

<sup>59</sup> *St. Nicholas Ins. Co. v. Merchants' F. Ins. Co.*, 83 N. Y. 604.

<sup>60</sup> *Faneuil Hall Ins. Co. v. Liverpool etc. Ins. Co.*, 153 Mass. 63; 26 N. E. Rep. 244.

should procure its assent, and not that of any other company. Moreover there was no provision either in the policy received by the German American Company from the plaintiff, or by the plaintiff from the defendant, or in the contract between the plaintiff and the defendant that the German American Company or its agent should not assent to the transfer of its policies. The insurance companies must be held to have entered into their respective contracts with the knowledge that as matter of law neither Marden nor any other German-American policy holder could be compelled to procure the assent of any other company, and with the knowledge that in the ordinary course of business applications of this kind would be made to that company by its policy holders, and therefore to have contemplated and understood, in the absence of any contrary provision, that the original insurer or its agent was to give the required assent to transfers, to receive proof of loss, and to attend to what may be called the local conditions of the policy, subject, in all cases, to the implied condition that nothing should be done without its assent to enhance the risk. We do not, therefore, think there is anything in the nature of the contract of reinsurance or of indemnity inconsistent with the power of the original insurer or its agent to assent to the assignment of the policy."<sup>61</sup> The reinsurer may be bound by the insurer's assent in writing to a change of title and by an assignment of the policy, as where a mortgage was foreclosed by a trustee to whom the policy was payable, and the property was bought by an agent of the mortgage bondholders, where the original policy permitted such change upon written consent of the insurer.<sup>62</sup>

**§ 123. Limitation of Risk to Particular Locality.—**

When the contract of reinsurance limits the risks to a particular locality, it will only include policies within that locality, as

<sup>61</sup> Citing *Manufacturers' Ins. Co. v. Western Assur. Co.*, 145 Mass. 419; *Consolidated Ins. Co. v. Cashow*, 41 Md. 59; *Fire Ins. Assn. v. Canada Ins. Co.*, 2 Ontario, 481, 495; *Jackson v. St. Paul Ins. Co.*, 99 N. Y. 124.

<sup>62</sup> *Manufacturers' F. & M. Ins. Co. v. Western Assur. Co.*, 145 Mass. 419; 5 N. E. Rep. 501.

where the contract limited the reinsurance to risks in the state of New York, and schedules describing the risks to be reinsured embraced certain risks elsewhere, as well as those in that state. It was decided that although the policies of reinsurance covered in terms the risks which were set forth in the schedules, yet they only included the risks in New York State.<sup>63</sup>

**§ 124. Condition as to Assignment.**—Where upon the decease of the insured the plaintiff obtained a judgment against the original insurer, and an assignment from it of its contract of reinsurance which prohibited any assignment or sale thereof, it was held that an action would lie against the reinsurer upon said contract, and that the prohibition was limited to assignment prior to loss.<sup>64</sup>

**§ 125. Condition as to Other Insurance.**—A condition in a policy of reinsurance, providing against other insurance, refers to other reinsurance, and the reinsurer cannot evade liability under this clause where there is no other reinsurance;<sup>65</sup> and where it is conditioned that the written consent of the company shall be obtained within ten days in case the property should be reinsured, the mere proof of the existence of an unauthorized reinsurance, without evidence that the same had been in existence at least ten days before the fire, will not avail the company.<sup>66</sup>

**§ 126. Conditions—Time Limit for Suing—Award.**—Although the original contract for insurance contains certain limitations providing for an appraisal and award before suit, and limits the time for suing, such conditions do not become a part of, nor affect the contract of reinsurance.<sup>67</sup>

**§ 127. Amount of Reinsurance.**—It is the loss or liability of the insurer assumed by him under his contract with

<sup>63</sup> London etc. F. Ins. Co. v. Lycoming F. Ins. Co., 105 Pa. St. 424.

<sup>64</sup> Lee v. Fraternal Mut. Ins. Co., 1 Handy (Ohio), 217. See Faneuil Hall Ins. Co. v. Liverpool etc. Ins. Co., 153 Mass. 63; 26 N. E. Rep. 244.

<sup>65</sup> Mutual S. Ins. Co. v. Hone, 2 N. Y. (2 Comst.) 235.

<sup>66</sup> Cumberland Mut. F. Ins. Co. v. Gittinan, 48 N. J. L. 495; 57 Am. Rep. 586.

<sup>67</sup> Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 446; Jackson v. St.



the insured which forms the basis of the contract of reinsurance. The contract is one of indemnity, and the insurer has an insurable interest only to the extent of that liability, and for this reason the amount of interest in reinsurance is limited by the insurer's liability under the original contract. It need not, however, be for the specific risk thereunder, as the insurer may reinsure for a smaller amount than his total liability.<sup>68</sup>

**§ 128. Representations and Warranties in Reinsurance.**—In the contract of reinsurance it is incumbent upon the insurer to communicate to the reinsurer all the facts of which he has knowledge which are material to the risk. And where he states as a fact something untrue with intent to deceive, or where he states a fact positively as true without knowing it to be true, and which tends to mislead, the policy is avoided where such facts materially affect the risk. And any undue concealment or intentional withholding of facts material to the risk which ought in good conscience to be communicated by him likewise avoids the contract,<sup>69</sup> where the reinsurer issues a new policy as a substitute for one issued by the reinsured, any warranty of the truth of the representations relates to the date of the original application, and not to the date of the new policy, and if such representations were true when made, no breach of warranty

Paul F. & M. Ins. Co., 99 N. Y. 124. *Examine Providence Ins. Co. v. Ætna Ins. Co.*, 16 U. C. Q. B. 135.

<sup>68</sup> See *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. St. 250. "In reinsurance the amount of interest is the sum insured in the original policy, with the addition of the premium of reinsurance deducting the original premium": 2 Phillips on Insurance, sec. 1248.

<sup>69</sup> *New York Bowery F. Ins. Co. v. New York F. Ins. Co.*, 17 Wend. (N. Y.) 359; *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485. It is also said in this case that the "exaction of information in some instances may be greater in a case of reinsurance than as between the parties to an original insurance": *Merchants' etc. M. Ins. Co. v. Washington Ins. Co.*, 1 Handy (Ohio), 408. Insurer must communicate all the representations of original insured, and also all the knowledge and information he possesses material to risk, whether previously or subsequently acquired: *Comp. Laws, Dak.*, 1887, sec. 4184; *Deering's Annot. Civ. Code, Cal.*, sec. 2647; *N. Y. Civ. Code*, sec. 1443; *Booth's Annot. Civ. Code, Mon.*, 1895, sec. 3531; *Rev. Code, N. Dak.* 1895, sec. 4534.

arises from the fact that they were false at the date of the new policy, nor is it any defense that the risk was not a safe one at the time of the issuance of the latter policy, where by the agreement between the reinsurer and insurer the former was obligated to reinsure all the risks of the latter.<sup>70</sup> And where it appeared that at the time the original insurance was effected the word "charter" was understood by the parties thereto to mean a guano charter, and the insurer did not communicate such fact to the reinsurer before making the contract of reinsurance, it was held that the information was material to the risk, and the reinsured was not entitled to recover in view of the fact that in the absence of an explanation to the contrary the "charter" intended must be regarded under the policy as covering only the route of the voyage described in the policy, and that a recovery against the reinsured for part of the insurance money based upon parol proof of the understanding of the parties to the original insurance as to the meaning of the word "charter," did not bind the reinsurer, and that a payment before said suit of a portion of said money did not amount to a recognition of an insurance on the guano charter;<sup>71</sup> and in a case in the United States supreme court <sup>72</sup> it was held <sup>73</sup> that it was not sufficient to convey specific information material to the risk in general terms.

**§ 129. Abandonment Unnecessary in Reinsurance.**—The insurer is under no obligation to abandon to the reinsurer, nor give the latter notice of abandonment to him by the insured, for it would be of disadvantage to the reassured to compel him to accept the abandonment of his assured, as he would be compelled to do before he himself could abandon.<sup>74</sup>

**§ 130. Proofs of Loss in Reinsurance.**—Generally, the original notices and proofs of loss are sufficient as against

<sup>70</sup> *Cohen v. Continental L. Ins. Co.*, 69 N. Y. 300. See, also, *Jackson v. St. Paul F. & M. Ins. Co.*, 99 N. Y. 124.

<sup>71</sup> *Ocean Ins. Co. v. Sun Mut. Ins. Co.*, 8 Ben. (C. C.) 272; 107 U. S. 485.

<sup>72</sup> *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 510, 511.

<sup>73</sup> Three justices dissenting.

<sup>74</sup> *Hastie v. De Peyster*, 3 Caines (N. Y.), 190 b, 194, per Kent, C. J., 195, per Livingston, J.; 2 Phillips on Insurance, 3d ed., 246, sec. 1506.

the reinsurer,<sup>75</sup> and if the reinsurer is presented with copies of the proofs of loss, he must object and demand the originals at the time, or the right to object will be presumed to have been waived.<sup>76</sup> If a policy of reinsurance is conditioned that all persons having a claim for loss shall proceed at once to give immediate notice and render a particular account of the loss, this means that the notice and schedule must be served in a reasonable time under the circumstances.<sup>77</sup> Preliminary proofs of loss may be dispensed with by the terms of the policy of reinsurance.<sup>78</sup>

**§ 131. Extent of Reinsurer's Liability.**—In the absence of an agreement to the contrary or a limitation clause, the reinsurer is bound to indemnify the reinsured to the extent of the latter's liability,<sup>79</sup> provided the amount of such liability does not exceed the actual loss and is within the amount re-insured,<sup>80</sup> and in case of a reinsurance of a fire risk a total loss is the full value in the policy of reinsurance, provided it does not exceed the value in the original policy, nor is the liability of the reinsurer limited to a proportionate sum, nor can the

<sup>75</sup> *New York Bowery L. Ins. Co. v. New York F. Ins. Co.*, 17 Wend. (N. Y.) 359. See, also, *Cashaw v. North West Ins. Co.*, 5 Biss. (C. C.) 476. The reinsured must prove loss in the same manner as assured must have proved it against him: *Yonkers & New York F. Ins. Co. v. Hoffman F. Ins. Co.*, 6 Rob. (N. Y.) 316.

<sup>76</sup> *Ex parte Norwood*, 3 Biss. (C. C.) 504, 516, 517.

<sup>77</sup> *Cashaw v. Northwestern Mut. Ins. Co.*, 5 Biss. (C. C.) 476.

<sup>78</sup> *Consolidated Real Estate Ins. Co. v. Cashaw*, 41 Md. 59.

<sup>79</sup> *Heckenrath v. American Mut. Ins. Co.*, 3 Barb. Ch. (N. Y.) 63; *Hastie v. De Peyster*, 3 Caines (N. Y.), 190; *Delaware v. Quaker City Ins. Co.*, 3 Grant's Cas. (Pa.) 71; *Eagle Ins. Co. v. Lafayette*, 9 Ind. 443; *Hone v. Mutual S. Ins. Co.*, 1 Sand. (N. Y.) 137. "It seems to me that upon the principles of the common law, under like circumstances, the party reassured is entitled to recover a full indemnity for the entire loss sustained by him, and also for the costs and expenses which he has reasonably and necessarily incurred, in order to protect himself and entitle him to a recovery over against the reassurers": *New York State M. Ins. Co. v. Protection Ins. Co.*, 1 Story (C. C.), 458, 461, per Story, J., cited in *Hone v. Mutual S. Ins. Co.*, 1 Sand. (N. Y.) 137, 148. See, also, as to costs, *Hastie v. De Peyster*, 3 Caines (N. Y.), 190 b.

<sup>80</sup> *Insurance Co. v. Insurance Co.*, 38 Ohio St. 11; 43 Am. Rep. 413; *New York State M. Ins. Co. v. Protection Ins. Co.*, 1 Story (C. C.), 458.

liability be thus limited by evidence of a custom of the place of contract so to do.<sup>81</sup>

**§ 132. Agreements Affecting Reinsurer's Liability.—**

The parties may agree to such terms in reinsurance as will bind the reinsurer to the settlement or adjustment of loss made between the parties to the original insurance, as where the policy of reinsurance provided that the contract was "to be subject to the same risks, valuations, conditions and mode of settlements as are or may be adopted by the" company reinsuring,<sup>82</sup> and the reinsurer may by agreement become liable directly to the original insurer. So in a New York case<sup>83</sup> the reinsurer agreed to reinsure and assume all risks on outstanding policies of another company and to pay to the policy holders all sums thereon for which the insurer would be liable. Two of said policies were life risks payable to plaintiff upon the death of the insured. The insured collected the sums due under said policies, and it was held that the collection of such insurance by the insurer did not under the agreement prevent a recovery against the reinsurer by plaintiff. Where a policy of reinsurance to a company which had insured a ship contained the clause "subject to the same terms and conditions as the original policy and to pay as may be paid thereon," and the reinsured company became liable for a loss, but had not yet paid the amount of the same, it was held that payment by such reinsured company of the loss was not a condition precedent to the recovery by the reinsured of the reinsurer.<sup>84</sup>

**§ 133. Reinsurer's Liability—Pro Rata Clause.—**If the policy contains a clause, "loss, if any, payable pro rata and at the same time with the reinsured," or like words, the recovery is limited thereby to that proportion which the amount reinsured sustains to the original amount.<sup>85</sup> So in case the

<sup>81</sup> *Hone v. Mutual S. Ins. Co.*, 1 Sand. (N. Y.) 137; 2 Comst. (2 N. Y.) 235.

<sup>82</sup> *Consolidated Real Estate etc. Co. v. Cashaw*, 41 Md. 59.

<sup>83</sup> *Glenn v. Hope etc. L. Ins. Co.*, 56 N. Y. 379.

<sup>84</sup> *In re Eddystone M. Ins. Co.; Ex parte Western Ins. Co.* (Eng. C. A. Ch. D. 1892) L. R. 2 Ch. D. (1892), 423.

<sup>85</sup> *Consolidated F. Ins. Co. v. Cashaw*, 41 Md. 59; *Cashaw v. Northwestern M. Ins. Co.*, 5 Biss. (C. C.) 476.

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reinsurance is for half the amount originally insured and a loss occurs which is less in amount than the original insurance, the recovery is limited to one-half the loss.<sup>86</sup> In this case the court, per Johnson, J., says: "In the case of *Howe v. The Mutual Safety Insurance Company*, 1 Sand. 137, it was adjudged that under a contract of reinsurance the extent of the liability of the reinsurer was not affected by the insolvency of the reassured, nor by its inability to fulfill its own contract with the original insured. This proposition was maintained by Mr. Justice Sandford, giving the judgment of the superior court of New York in a careful and learned opinion, thoroughly setting forth the reasons on which the decision rested and the authorities supporting it. This judgment was affirmed in the court of appeals in 2 N. Y. 235. We have examined the printed record as it was presented to the court, and find that the questions mentioned were distinctly raised both by the exceptions taken at the trial and by the points of the counsel on both sides used in the argument. That these questions were not particularly noticed in the opinions delivered in the court of appeals must be attributed to their being regarded as too well settled to require notice. They were necessarily involved in the judgment pronounced, and the silence of the opinions scarcely diminishes the force of the precedent. A recovery was had in the case for the full amount of the reinsurance, notwithstanding it appeared that the reassured company was insolvent and had been dissolved, and that its assets were not sufficient to pay more than fifty per cent of its debts. The policy now in suit differs from that in the case cited in containing the following clause: 'Loss, if any, payable pro rata, and at the same time with the reinsured.' By virtue of the first part of this clause the defendant is not bound to pay the full amount reinsured by its policy, but only such a proportion of the amount of the loss as is in the ratio of the amount of the reinsurance to the amount originally insured. Thus, the defendant's reinsurance being for half the amount of the original insurance, the defendant is to pay half the loss. The latter part of such clause does not require that payment by the reinsured should precede or

<sup>86</sup> *Blackstone v. Alemannia F. Ins. Co.*, 56 N. Y. 104.

accompany payment by the reinsurer,<sup>87</sup> and where in addition to the pro rata clause the policy also contained a provision that the loss should be settled in the proportion which the amount reinsured bore to the whole amount originally covered, the reinsurer was held liable to be reinsured in the same proportion it was obligated to indemnify its insured.<sup>88</sup> It is held, however, that the pro rata clause merely gives the company the benefit of any defense, deduction, or equity which the first insurer may have, making the liability of the reinsurer the same as the original insurer, and that it does not limit such liability to what the original insurer may have paid or be able to pay,<sup>89</sup> and in Illinois<sup>90</sup> it is decided that the pro rata clause limits the liability of the reinsurer to a proportionate share of the amount actually paid by the reinsured. In this case the original insurance was for six thousand dollars, the reinsurance was for two thousand dollars, and the insurer becoming insolvent settled with the insurer at ten per centum or six hundred dollars, and the court held that the reinsurer's liability was only two hundred dollars. This decision, however, involves a question as to what extent the insolvency of the insurer affects the liability of the reinsurer, which will be considered in the next section.

**§ 134. Reinsurer's Liability—Compromise—Insolvency of Insurer.**—There has been much discussion, both by the courts and text-writers, as to what effect the insolvency of the insurer and his consequent inability to fully pay the insured, or his compromise with the assured, has upon the liability of the reinsurer to him, the insurer. Mr. Marshall<sup>91</sup> asserts that the reinsurer can gain nothing by the insurer's insolvency but must pay his loss in full. Mr. Parsons,<sup>92</sup> however, upholds the doctrine which makes the reinsurer liable not in full but only to the extent proportionally for which the insured

<sup>87</sup> *Blackstone v. Alemannia F. Ins. Co.*, 56 N. Y. 104.

<sup>88</sup> *Norwood v. Resolute F. Ins. Co.*, 4 Jones & L. (N. Y.) 552.

<sup>89</sup> *Ex parte Norwood*, 3 Biss. (C. C.) 504, and note, 519.

<sup>90</sup> *Illinois Mut. Ins. Co. v. Andes Ins. Co.*, 67 Ill. 362; 16 Am. Rep. 620.

<sup>91</sup> 1 Marshall on Insurance, 143, citing *Emerigon*.

<sup>92</sup> 1 May on Insurance, 3d ed., sec. 11 a.

settled. He bases this conclusion upon the principle of indemnity, and makes a distinction between a settlement by the insurer with the insured before and after having recourse to the reinsurer, and says that in the former case the insurer may recover to the extent of his liability as governed by the reinsurance contract, and settle as best he can with the insured, while in the latter case he can recover no more than he has paid. Mr. Wood<sup>83</sup> says: "The reinsurer must pay his share of the loss whether the insurer has paid, or has the ability to pay, its proportion of the loss or not"; but he also declares<sup>84</sup> that the question is an open one, and that while the "weight of authority" does not give the reinsurer the benefit of the compromise, the opposite conclusion "would be more consistent and consonant with principle," on the ground of indemnity. If it be assumed that there is no settled rule of law in view of which the parties would be presumed to have contracted, and the question were now for the first time to be determined, then there would seem to be no reason why the reinsurer should not be obligated to the full extent of the liability of the insurer under the original contract, notwithstanding the latter's insolvency or settlement for a less sum with the insured, provided always that such liability is not in excess of the amount covered by the reinsurance. If reinsurance is one of indemnity, the reinsured should only recover for the actual loss sustained. The principle of indemnity would not seem to conflict with such a rule since the indemnity contemplated relates to the loss or liability of the insurer under the original insurance,<sup>85</sup> and the reinsurer's liability must be held to have attached when that loss arises and the insurer becomes liable to the insured. The reinsurer has agreed to pay according to the terms of its contract, nor can another and different agreement be engrafted thereon to the effect that any compromise by the insurer with the insured of his liability shall inure to the benefit of the reinsurer. Again if the principle of indemnity is governed by the fact whether a settlement is made before or after recourse

<sup>83</sup> 1 Wood on Fire Insurance, 2d ed., p. 194, sec. 87.

<sup>84</sup> 2 Id. 818.

<sup>85</sup> Sec. 112, herein.

to the reinsurer, it must be a peculiar one, since it would then admit of a profit in one case and not in the other, which is a perversion of the principle. Again there is no privity of contract between the insured and the reinsurer in any case where this question could arise.<sup>96</sup> If the insurer be insolvent, the reinsurance moneys form part of the general fund for the payment of its debts,<sup>97</sup> and the sum due from the reinsurer belongs to his creditors pro rata;<sup>98</sup> and the original insured has no equitable lien or preferable claim upon the money due upon the contract of reinsurance.<sup>99</sup> Again, the indemnity intended is that which the contract of reinsurance contemplates. Finally, the weight of authority is that the reinsurer can derive no advantage from the insolvency of the insurer, and the settlement by him with the insured for a less sum than his liability under the original contract. So where the amount insured was ten thousand dollars and the reinsurance five thousand dollars, and the policy contained a pro rata clause, the reinsurer was held liable for one-half the insurer's loss, notwithstanding his bankruptcy and settlement for a small dividend,<sup>100</sup> and other cases hold that the reinsurer is bound to pay the amount which the original insurer becomes legally liable to pay to the assured in consequence of the risk assumed, and not merely the amount which the original insurer actually pays in consequence of the risk assumed by him;<sup>101</sup> although there are decisions

<sup>96</sup> Sec. 117, herein.

<sup>97</sup> *Herckenrath v. American Mut. Ins. Co.*, 3 Barb. Ch. (N. Y.) 63. See, also, *May on Insurance*, 3d. ed., sec. 11 a, where Mr. Parsons says: "The claim against the reinsurer was part of the assets in the hands of the receiver to be administered for the benefit of all the creditors."

<sup>98</sup> *Hone v. Mutual S. Ins. Co.*, 1 Sand. (N. Y.) 127; 2 N. Y. (2 Comst.) 235; *Goodrich's Appeal* (Pa. S. C.), 10 Pa. St. 523; 1 Cent. Rep. 431. See *Mason v. Cronk*, 125 N. Y. 496; 35 N. Y. 859; reversing 27 N. Y. 122.

<sup>99</sup> *Herckenrath v. American Mut. Ins. Co.*, 3 Barb. Ch. (N. Y.) 63; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289, 296, 297; 21 Am. Rep. 417; *Consolidated etc. F. Ins. Co. v. Cashaw*, 41 Md. 59.

<sup>100</sup> *Consolidated etc. F. Ins. Co. v. Cashaw*, 41 Md. 59. Clause in this case was, "Loss, if any, payable pro rata to them . . . at same time and in same manner as they pay."

<sup>101</sup> *Herckenrath v. American Mut. Ins. Co.*, 3 Barb. Ch. (N. Y.) 63; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443; *Hone v. Mutual S. Ins. Co.*, 1 Sand. (N. Y.) 138; 2 N. Y. (2 Comst.) 235; *Blackstone v.*



which hold that the sum paid by the insurer is the measure of indemnity.<sup>102</sup>

§ 135. **When Suit may be Brought Against Reinsurer—Rights of Original Insured.**—The insurer may wait until suit brought and judgment obtained by the insured before seeking indemnity from the reinsurer,<sup>103</sup> and the reinsurer is bound under a valid contract of reinsurance when the reinsured has been found liable or the loss adjusted.<sup>104</sup> It is also held, however, that before reinsurers can recover, they must show that they have paid a valid claim, by showing that the primitive insurers had a risk upon the subject insured and that such subject was destroyed;<sup>105</sup> but it is not necessary that the insured should have paid the loss before proceeding against the reinsurer. Suit may be brought as soon as the liability occurs, for the contract is one of indemnity against the liability of the insurer for loss, and it is sufficient that such liability to pay for the loss exists, for the contract does not go to the insurer's payment of, or ability to pay, the loss.<sup>106</sup> Where a company transfers its stock to a reinsuring company upon a guaranty that its obligations to its policy holders shall be fulfilled, some liability to such policy holders must accrue before any action lies upon such guaranty, but when the reinsurer passes into a receiver's hands, and the claims of the policy holders are presented and

*Alemannia F. Ins. Co.*, 56 N. Y. 104; *Gantt v. American Cent. Ins. Co.*, 68 Mo. 503; 1 *Marshall on Insurance*, ed. 1810, \*143; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289, 296, 297; 21 *Am. Rep.* 417; *Hastie v. De Peyster*, 3 *Caines* (N. Y.), 193, 194, per Kent, C. J.; *Cashaw v. Northwestern Ins. Co.*, 5 *Biss. (C. C.)* 476.

<sup>102</sup> *Insurance Co. v. Insurance Co.*, 38 *Ohio St.* 11; 43 *Am. Rep.* 413; *Illinois Mut. Ins. Co. v. Andes Ins. Co.*, 67 *Ill.* 362; 16 *Am. Rep.* 620; for facts in this case, see end of sec. 133, ante; 2 *Wood on Fire Insurance*, 818, note 8.

<sup>103</sup> *Hone v. Mutual S. Ins. Co.*, 1 *Sand. (N. Y.)* 137; 2 *N. Y. (2 Comst.)* 235.

<sup>104</sup> *Jackson v. St. Paul F. & M. Ins. Co.*, 99 *N. Y.* 124. See *Ex parte Norwood*, 3 *Biss. (C. C.)* 504.

<sup>105</sup> *Yonkers etc. Ins. Co. v. Hoffman F. Ins. Co.*, 6 *Rob. (N. Y.)* 316.

<sup>106</sup> *Blackstone v. Alemannia F. Ins. Co.*, 4 *Daly (N. Y.)*, 299; *Ex parte Norwood*, 3 *Biss. (C. C.)* 504; *Gantt v. American Cent. Ins. Co.*, 68 *Mo.* 503; *Hone v. Mutual S. Ins. Co.*, 1 *Sand. (N. Y.)* 137; 2 *N. Y. (2 Comst.)* 235; *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 *Ind.* 443; *Philadelphia etc. Ins. Co. v. Fame Ins. Co.*, 9 *Phila. (Pa.)* 292.

established, the guaranty should be turned into assets to meet the claims of creditors.<sup>107</sup> If a policy holder, upon learning of the insolvency of the company, enters into a contract of reinsurance with another company, he may lose his remedy against the original company,<sup>108</sup> and where a New York company had an office in Chicago, and reinsured with another company which afterward became bankrupt, and the reinsured went into insolvency and a receiver was appointed by a New York court, it was held that such receiver might prove the debt against a bankrupt in the United States court.<sup>109</sup> Where the defendant reinsured all its risks and had a large sum of money in the treasury, being the proceeds of cash payments by the then present and also by the past policy holders, and the interest on the investments thereof, which sum had been of about the same amount for several years, it was held that all the policy holders who contributed to such surplus are entitled to a proportion thereof according to the amount of their respective payments, whether they continued to be policy holders at the period of distribution or not.<sup>110</sup> Where an insurance company sells out its business to another company, and in consideration thereof the latter reinsured the former company's risks, and agreed to pay, satisfy, and discharge the losses, this is a mere contract of reinsurance, and there is sufficient privity between a policy holder and the vendee company to enable the former to maintain an action against the latter for a loss.<sup>111</sup> The deposit required under the Missouri statute of a life insurance company is a trust fund for the benefit of the policy holders of the company making such deposit, and where notes are made to take the place of this fund by a company which has assumed the policies of the original company, these notes are held upon the same trust as the funds they were intended to replace.<sup>112</sup> The fact that the policy holders of the reinsured company have paid premiums to

<sup>107</sup> *Mason v. Cronk*, 125 N. Y. 496; 35 N. Y. 859.

<sup>108</sup> *Ewing v. Coffman*, 12 Lea (80 Tenn.), 79.

<sup>109</sup> *Ex parte Norwood*, 3 Biss. (C. C.) 504

<sup>110</sup> *Smith v. Hunterdon Co. Mut. Ins. Co.*, 41 N. J. Eq. 473.

<sup>111</sup> *Johannes v. Phoenix Ins. Co.*, 66 Wis. 50; 57 Am. Rep. 249.

<sup>112</sup> *Relie v. Columbia L. Ins. Co.*, 10 Mo. App. 150.

the reinsuring company does not deprive them of the remedy against the trust fund, nor does the fact that the reinsuring company has paid many policies of the reinsured company discharge the trust.<sup>113</sup> In *Glen v. Hope Mutual Life Insurance Company*<sup>114</sup> the insurer reinsured the life of one of its policy holders in two other companies for ten thousand dollars, the original insurance being for fifteen thousand dollars. Subsequently a third company reinsured all the outstanding policies of the original insurer, and thereafter the insured died. In an action upon the policies it was decided that the last reinsurer was liable directly to the policy holders, notwithstanding its agreement to indemnify the original insurer against losses. It was also held that said last reinsurer was liable to the policy holders for the whole amount reinsured, although arbitrators acting between such reinsurer and the original insurer alone, the policy holders not being parties thereto, had rendered a decision limiting such liability to five thousand dollars.

§ 136. **Reinsurance—Recovery—Evidence.**—If it appears that no liability has attached against the insurer under the original contract, there can be no recovery against the reinsurer, for nothing exists upon which to base an indemnity,<sup>115</sup> and if the claim of the insured is paid it must have been a valid one to warrant a recovery from the reinsurer.<sup>116</sup> It must also appear that the insurer has an insurable interest, although this is evidenced by the fact that he is a reinsurer of the original insured; he must also prove his loss and the amount the same as the original insured must have proved it against him;<sup>117</sup> and proof of a judgment against the insurer upon the original contract, in defense of which the reinsurer engaged, is sufficient evidence of the insurable interest of the insurer, and a sufficient proof of the loss.<sup>118</sup>

§ 137. **Reinsurer Bound by Judgment—Notice to Defendant.**—The insurer may, before proceeding against the reinsurer,

<sup>113</sup> *Relfe v. Columbia L. Ins. Co.*, 10 Mo. App. 150.

<sup>114</sup> 56 N. Y. 379; 1 S. C. 463.

<sup>115</sup> *Eagle Ins. Co. v. Lafayette Ins. Co.*

<sup>116</sup> *Yonkers Ins. Co. v. Hoffman Ins.*

<sup>117</sup> *Yonkers Ins. Co. v. Hoffman Ins.*

<sup>118</sup> *Ocean Ins. Co. v. Sun. Mut. Ins.*

contest the right of the insured to recover on the original contract, and in such cases, if the reinsurer is notified and it refuses or neglects to defend, it is bound by the judgment against the insurer and is liable for the reasonable and necessary expenses and costs incurred bona fide in such defense,<sup>119</sup> although the reinsurer is not a party of record,<sup>120</sup> especially where such suit was defended by the advice and for the benefit of the reinsurer.<sup>121</sup> So it is liable for the costs and expenses incurred bona fide and paid to the insured after notice to it to defend.<sup>122</sup> In *Gantt v. American Central Insurance Company*,<sup>123</sup> an agreement was made with the reinsurers by the insurer under which the latter was to employ counsel and defend a suit of the insured, and, in case of a successful defense, the reinsurers were to pay pro rata the counsel fees and costs. If unsuccessful, then to pay its pro rata of the judgment, counsel fees and costs. Pending suit a compromise was effected with the insured without the reinsurer's consent, whereby the insured was paid a certain amount of cash and the policies of reinsurance were to be assigned to him in case of judgment in his favor, and he was to enter satisfaction of the judgments on receiving the assignments. The right of the insurer to continue the suit was reserved, but the money paid the insured was to be retained whether the suit should be lost or won. The insured obtained judgment. The policies were assigned to him and satisfaction was entered of the judgment. Although the reinsurers knew of this agreement, they did not defend nor prevent the insurer's doing so. An action was brought by a trustee of the insured upon the assigned policies. The court decided that the insurer was the agent of the reinsurers to conduct the defense, but that the reinsurers were not prevented

<sup>119</sup> *New York State M. Ins. Co. v. Protection Ins. Co.*, 1 Story (C. C.), 458. See *Hastie v. De Peyster*, 3 Caines (N. Y.), 190 b; *Hone v. Mutual S. Ins. Co.*, 1 Sand. (N. Y.) 148; *Strong v. Phoenix Ins. Co.*, 62 Mo. 289; 21 Am. Rep. 417; *New York C. Ins. Co. v. National Prot. Ins. Co.*, 20 Barb. (N. Y.) 468.

<sup>120</sup> *Strong v. Phoenix Ins. Co.*, 62 Mo. 289; 21 Am. Rep. 417.

<sup>121</sup> *Strong v. Phoenix Ins. Co.*, 62 Mo. 289; 21 Am. Rep. 417.

<sup>122</sup> *New York State M. Ins. Co. v. National Prot. Ins. Co.*, 1 Story (C. C.), 458.

<sup>123</sup> 68 Mo. 603.

from also coming in and defending for themselves; that the insurer had the right to compromise as it did, and the authority to continue the suit thereafter; that the reinsurers' neglect to defend must be considered as an acquiescence on their part to the defense made by the insurer, and that the reinsurers, in the absence of a showing of a lack of bona fides on the part of the insurer in defending were liable.

§ 138. **Defenses Available to Reinsurer.**—Inasmuch as the reinsurer is only liable for the amount for which the insurer is legally liable,<sup>124</sup> the former may avail himself of every defense which could have been made by the insurer. This rule is well settled.<sup>125</sup> So the reinsurer may defend on the ground that the loss was partial and obtain the benefit thereof notwithstanding the insurer has paid a total loss.<sup>126</sup> If the insurer makes an assignment, and before the filing of a petition in bankruptcy the reinsurer purchases claims against the insurer for losses, such claims may be set up as counterclaims when covered by the reinsurance, otherwise not.<sup>127</sup> But where the insurer, without fraud or falsehood, makes an oral promissory representation before the policy issues, and it is not mentioned in the policy, the failure to comply therewith by the insurer does not constitute a defense.<sup>128</sup>

<sup>124</sup> *Delaware Ins. Co. v. Quaker City Ins. Co.*, 3 Grant Cas. (Pa.) 71. See cases next note.

<sup>125</sup> *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443, 447; *New York State M. Ins. Co. v. National Prot. Ins. Co.*, 1 Story (C. C.), 458; *Delaware Ins. Co. v. Quaker City Ins. Co.*, 3 Grant Cas. (Pa.) 71; *Hastie v. De Peyster*, 3 Caines, 190 b, \*195; *Merchants' Mut. Ins. Co. v. New Orleans Mut. Ins. Co.*, 24 La. Ann. 305. See *Washington etc. Ins. Co. v. Merchants' etc. Ins. Co.*, 5 Ohio St. 450; *Hone v. Mutual etc. Ins. Co.*, 1 Sand. (N. Y.), 137; *St. Nicholas Ins. Co. v. Merchants' Ins. Co.*, 11 Hun (N. Y.), 103.

<sup>126</sup> *Merchants' Mut. Ins. Co. v. New Orleans Ins. Co.*, 24 La. Ann. 305.

<sup>127</sup> *In re Cleveland Ins. Co.*, 22 Fed. Rep. 200.

<sup>128</sup> *Prudential Assur. Co. v. Aetna L. Ins. Co.*, 23 Fed. Rep. 438.

## CHAPTER VI.

### THE POLICY—ITS FORM AND REQUISITES.

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§ 145. **Policy Defined.**—A policy of insurance is the written or printed form to which the contract has been reduced, and which evidences the agreement or contract between the parties, and it may, as we have stated, be either a specialty or simple contract.<sup>1</sup>

§ 146. **Certificates in Mutual Benefit Societies or Associations.**—In mutual benefit companies or associations whose legal status is that of mutual insurance companies, and which issue certificates of membership, such certificates are in effect insurance policies and the measure, to a certain extent, of the rights of the parties,<sup>2</sup> although they may not be strictly policies,<sup>3</sup> especially in regard to the right to change beneficiaries and as regards assignment.<sup>4</sup> Again, as said by Mr.

<sup>1</sup> "Policy" covers any contract or agreement for sea insurance under the stamp act: 30 Vict., c. 23, sec. 4. Definition of policy: See Deering's Annot. Civ. Code, Cal., sec. 2586; Comp. Laws, Dak. 1887, secs. 4141, 4142; 1 Levissee's Dak. Codes, sec. 1517.

<sup>2</sup> Chartrand v. Brace, 16 Col. 19; 32 Cent. L. J. 410; 25 Am. St. Rep. 235; Supreme Council etc. v. Forsinger, 125 Ind. 52; 21 Am. St. Rep. 196; Elkhart Mut. etc. Assn. v. Houghton, 98 Ind. 149; 103 Ind. 236; 53 Am. Rep. 513. See National B. Assn. v. Bowman, 110 Ind. 357; 11 N. E. Rep. 316; Bolton v. Bolton, 73 Me. 299; Knights of H. v. Nairn, 60 Mich. 44; State v. Association, 18 Neb. 281; Holland v. Taylor, 111 Ind. 125; 12 N. E. Rep. 116; 9 West. Rep. 606; 1 Bacon on Benefit Societies and Life Insurances, 2d ed., sec. 304.

<sup>3</sup> Martin v. Stubbings, 126 Ill. 387, 403; 9 Am. St. Rep. 625; State v. Farmers' Mut. B. Assn., 18 Neb. 276; Com. v. Weatherbee, 105 Mass. 160; State v. Vigilant etc. Ins. Co., 30 Kan. 587, 588; State v. Merchants' Mut. etc. Soc., 72 Mo. 160; Supreme Commandery etc. v. Ainsworth, 71 Ala. 436; 46 Am. Rep. 332; Sherman v. Commonwealth, 82 Ky. 102. The application and certificate constitute the contract: Redmond v. Industrial B. Assn., 78 Hun (N. Y.), 104; 60 N. Y. 531; 28 N. Y. Supp. 1075; citing Hutchinson v. Supreme Tent etc., 68 Hun (N. Y.), 355; Smith v. Brown, 27 N. Y. Supp. 11. When not a policy: The certificate of membership of a beneficial association is not an insurance policy within the meaning of an act providing for the attachment of application to policy, otherwise that it shall not be admitted in evidence: Lithgow v. Supreme Tent etc., 165 Pa. St. 292 (under act Pa., May 11, 1881, No. 23, P. L. 20).

<sup>4</sup> Holland v. Taylor, 111 Ind. 125; 12 N. E. Rep. 116; Nye v. Grand Lodge etc., 9 Ind. App. 148, per Lotz, J., who says: "For many purposes such associations as the appellee, the A. O. U. W., are insurance companies, and the certificate issued by them is governed by the same rules applicable to insurance policies. There are, however, essen-

Niblack, they are only a part of the written evidence of the contract, the charter, constitution, and by-laws in force at the time of the member's admission, being a part of the contract, while a policy should express the entire contract.<sup>5</sup> It has been held that, under certain requirements of the charter and by-laws of a mutual benefit society relating to beneficiaries, the issuing of a certificate of membership was not a condition precedent to the right to recover the benefit fund, and that such certificate was only necessary where the money was to be paid as directed by a member to some person or body other than the family, heirs, or legal representatives of the deceased member.<sup>6</sup> When the company is one that issues certificates, these together with the charter or articles of association and the by-laws or rules of the organization, and the general laws of the state, constitute the contract;<sup>7</sup> but the certificate may show that certain by-laws have been waived, or that they are inconsistent with its terms, or they may not be annexed thereto as required by certain statutes,<sup>8</sup> all of which factors are important in considering what weight should be given to the certificate as evidence in controlling the construction of the contract, and such contracts are, therefore, subject to the rules of law governing insurance policies in like cases, except so far as these rules must be held to be modified by the peculiar organization, objects, and policy of such societies or companies.<sup>9</sup> In certain mutual

tial differences between them: the most usual is the power on the part of the assured in such associations to change the beneficiary": Where charter, etc., against such right. See chapters herein on Beneficiaries; Niblack's Mutual Benefit Societies and Accident Insurance, ed. 1888, 199, sec. 166 a; id., 2d ed., secs. 136, et seq., 165, et seq., 211, et seq.; 1 Bacon's Benefit Societies and Life Insurance, 2d ed., sec. 304. See chapters xxv, xxvi, herein.

<sup>5</sup> Niblack's Benefit Societies and Accident Insurance, 2d ed., p. 271, sec. 136.

<sup>6</sup> Bishop v. Grand Lodge etc., 112 N. Y. 627; reversing 43 Hun (N. Y.), 472.

<sup>7</sup> See secs. 186-88, 191, herein.

<sup>8</sup> Secs. 186-88, herein.

<sup>9</sup> Martin v. Stubbings, 126 Ill. 387, 403; 9 Am. St. Rep. 625; Elkhart Mut. etc. Assn. v. Houghton, 98 Ind. 149. See, as to change of beneficiary, Miner v. Michigan Mut. B. Assn., 63 Mich. 338; Titworth v. Titworth, 40 Kan. 571; Union Mut. Assn. v. Montgomery, 70 Mich. 587; 14 Am. St. Rep. 519, and note, 526, 527.



benefit or fraternal societies, however, no certificate is required to be issued. In such case the charter, constitution, and by-laws must be looked to to determine the contract, both in relation to the member himself and the beneficiary.<sup>10</sup>

§ 147. **Division and Kinds of Policies.**—Policies are divided with reference to (1) insurable interest, (2) the amount, and (3) duration. Insurable interest covers wager and interest policies. The amount covers open and value policies. Open policies are sometimes known as floating or blanket policies. Duration covers time and voyage policies. There is also a class of policies known as "mixed policies," which may relate to the amount, as where the policy is partly open and partly valued; or to the duration, as where the policy sets out the termini but limits the risk by time. There are also many other kinds of policies, or, rather, plans of insurance, such as endowment, tontine, semi-tontine, etc. These will be considered hereafter, however, under the sections relating to the terms and stipulations in the policy, so far as there are decisions bearing thereon.

§ 148. **Wager Policies.**—Wager policies are those in which the insured has no interest whatever in the subject matter insured, but only an interest in its loss or destruction.<sup>11</sup> This contract is an insurance in name only.<sup>12</sup> It is speculative in its nature and does not deal with real values. The usual words in a wager policy are "interest or no interest," or "without further proof of interest than the policy," or "free of average without benefit of salvage to the assured," although these words are not conclusive in this country in determining whether or not the policy is a wager. So where a policy was underwritten for ten thousand dollars on profits on merchandise on board a brig from C. to B., free of average and salvage, and the policy to be the only proof of interest required, it was

<sup>10</sup> *Baldwin v. Golden Star Fraternity*, 47 N. J. L. 111, 112. See *Bishop v. Grand Lodge etc.*, 112 N. Y. 627, reversing 43 Hun (N. Y.), 472; *Tyrell v. Washburn*, 6 Allen (88 Mass.), 466, 468.

<sup>11</sup> *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 460. See *Sawyer v. Dodge Co. Mut. Ins. Co.*, 37 Wis. 538, 539.

<sup>12</sup> *Emerigon on Insurance*, Meredith's ed. 1850, 4.

held not a gaming policy, the insured having property on board and neither he nor the insurers intending a wager policy, but an interest policy,<sup>13</sup> it being declared in this case that both parties must intend to wager, and that if one party only intends a gaming policy, and procures the other to underwrite it as a policy on interest, the policy is void for fraud. The whole question depends upon whether the contract covers an actual insurable interest or is intended as an indemnity therefor, or whether it is a mere wager. For an insurance made without such interest is void,<sup>14</sup> the presumption being in such case that the policy was taken out for the purpose of a wager or speculation;<sup>15</sup> although where for a premium of two and a half per cent A. agreed with B. to insure a negro slave, at the time reported to be lost while on board a boat, and B. had no interest in the negro, but his loss was proved as reported, he was held entitled to recover his value.<sup>16</sup> But precisely what interest is necessary to exist in order to make the policy not a wager has been much discussed. In that class of insurances where the contract is strictly one of indemnity, as in marine and like insurances, there is not so much difficulty as in life insurance or in accident insurance where the injury results in death, since in such cases the loss can seldom be measured by pecuniary values.<sup>17</sup> A wager policy may exist where the insured has an interest in the subject matter and still wagers respecting it.<sup>18</sup>

**§ 149. Wager Policies Valid at Common Law now Void.**  
It is well settled that wager policies and wagers which were not contrary to the policy of the law were valid contracts at com-

<sup>13</sup> *Alsop v. Insurance Co.*, 1 Sum. (C. C.) 451. See *Hemminway v. Heaton*, 13 Mass. 108; *Glendinning v. Church*, 3 Caines (N. Y.), 141, 144.

<sup>14</sup> *Goddart v. Garrett*, 2 Vern. 269. See *Spare v. Home Mut. Ins. Co.*, 15 Fed. Rep. 707; *Insurance Co. v. Butler*, 38 Ohio St. 128, 133.

<sup>15</sup> *United Brethren etc. v. McDonald* (Pa. 1888), 1 Law Rep. Ann. 238.

<sup>16</sup> *Shepherd v. Sawyer*, 2 Murph. (N. C.) 26; 5 Am. Dec. 517.

<sup>17</sup> *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 460, per Bradley, J.

<sup>18</sup> *Kent v. Bird*, Cowp. 583. See *Jubel v. Church*, 2 Johns. Cas. (N. Y.) 333.

mon law.<sup>19</sup> Although it is said that this doctrine had never been applied to fire insurance,<sup>20</sup> yet it has been held that such insurances were void as wager policies at the common law.<sup>21</sup> In 1746, however, the statute 19 George II., chapter 37, was enacted prohibiting this class of contracts in marine risks with certain exceptions, and a few years later, in 1774, the statute 14 George III., chapter 48, was passed prohibiting insurances upon lives by way of gaming or wagering.<sup>22</sup> Although there are statutes in some of the states against wagering contracts, and although wager policies were held valid in New York prior to the enactment of the statute in that state,<sup>23</sup> yet a wager insurance should be held void on general principles of public policy and morality, and the tendency of our courts has been

<sup>19</sup> *Dalby v. India etc. L. Assur. Co.*, 15 Com. B. 365, 386; *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 331; *Crawford v. Hunter*, 8 Term Rep. 23; *Juhel v. Church*, 2 Johns. Cas. (N. Y.) 333, note b; *Cousins v. Nantes*, 3 Taunt. 522; *Abbott v. Sebor*, 3 Johns. Cas. (N. Y.) 39; 2 Am. Dec. 239; *Trenton Mut. L. etc. Ins. Co. v. Johnson*, 4 Zab. (24 N. J. L.) 576, 583; *Dean v. Dicker*, 2 Str. 1250. See *Allen v. Hearn*, 1 Term Rep. 56; *Atherton v. Beard*, 2 Term Rep. 610; *Roebuck v. Hammerton*, Cowp. 737; *Bunyon on Life Assurance*, 2d ed., 8. See *Evans v. Jones*, 5 Mees. & W. 77; *Goddart v. Garrett*, 2 Vern. 269. Contra, *Ruse v. Mutual B. L. Ins. Co.*, 23 N. Y. 516. See cases pro and con as to validity of wagers generally: 2 Parsons on Contract, 7th ed., 896, \*755.

<sup>20</sup> Wood on Fire Insurance, sec. 37, p. 94.

<sup>21</sup> *Freeman v. Fulton F. Ins. Co.*, 14 Abb. Pr. (N. Y.) 398. But see *Juhel v. Church*, 2 Johns. Cas. (N. Y.) 333, note b.

<sup>22</sup> The act 19 George II., chapter 37, provides that any assurance made on ships, "or on any goods, merchandises, or effects laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy or by way of gaming or wagering, or without benefit of salvage to the assurer," shall be void, excepting, however, assurance on private ships of war, assurances on effects from Spain and Portugal, etc. The act 14 George III., chapter 48, prohibits insurance "on the life or lives of any person or persons, or on any other event or events whatsoever wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made shall have no interest, or by way of gaming or wagering." "Every stipulation in a policy of insurance for the payment of loss, whether the person insured has or has not any interest in the property insured, or that the policy shall be received as proof of such interest, and every policy executed by way of gaming or wagering, is void": *Deering's Annot. Civ. Code, Cal.*, sec. 2558.

<sup>23</sup> See *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 318; *Juhel v. Church*, 2 Johns. Cas. (N. Y.) 333, note b.

against upholding these contracts,<sup>24</sup> for the above reason and also on the ground already indicated, that the contract of insurance is intended only to protect an actual insurable interest, or to indemnify for an actual loss, and deals with real values, and is not intended to be speculative, and it is immaterial that the policy is taken in good faith and with full knowledge. The policy of the law does not admit of such insurance, although the parties may willingly contract therefor. The foundation of all insurances, unless of the wager kind, is the real value of the thing insured.<sup>25</sup>

§ 150. **Wager Policy — Conflict of Laws.**—It is held in Pennsylvania that a wagering life policy cannot be enforced there, although valid in the state where it was signed and is to be paid.<sup>26</sup>

<sup>24</sup> *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 248, per Burwell, J.; 18 S. E. Rep. 175; 23 Ins. L. J. 53; *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 460; *White v. Equitable etc. Ins. Co.*, 76 Ala. 251; 52 Am. Rep. 325; *Ruse v. Mutual B. L. Ins. Co.*, 23 N. Y. 422; *Hort v. Hodge*, 6 N. H. 104, 105; 25 Am. Dec. 451; *Callamore v. Day*, 2 Vt. 144; *King v. State Mut. F. Ins. Co.*, 7 Cush. (61 Mass.) 1, 10; 54 Am. Dec. 683; *Pritchett v. Insurance Co. of North America*, 3 Yeates (Pa.), 461; 3 Kent's Commentaries, 13th ed., 277; 1 Duer on Insurance, ed. 1845, 92. Emerigon, in his work on Insurance (Meredith's ed. 1850, c. i, sec. 1, p. 4), writing of wager policies, declares that the reason of their not being more generally allowed to embrace the fortune of ships is, that "navigation has been viewed as a matter interesting the state. . . . It is not to be borne, therefore, that one should be placed in a situation to desire the loss of a vessel. The greediness of gain is capable of producing crimes which it is desirable to prevent. Hence the cause that in most commercial places wager insurances have been prohibited."

<sup>25</sup> See *Snell v. Delaware Ins. Co.*, 1 Wash. (C. C.) 509; *Agricultural Ins. Co. v. Montague*, 38 Mich. 548; 7 Ins. L. J. 708; 31 Am. Rep. 326; *Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 460; *Insurance Co. v. Butler*, 38 Ohio St. 133, per McIlvaine, J.; *Stetson v. Massachusetts Mut. F. Ins. Co.*, 4 Mass. 336, 337; 3 Am. Dec. 219, per Sewall, J.; *Mutual Ins. Co. v. Allen*, 138 Mass. 27; 52 Am. Rep. 246, 247; *Freeman v. Fulton F. Ins. Co.*, 38 Barb. (N. Y.) 247; 14 Abb. Pr. (N. Y.) 398.

<sup>26</sup> *McDermot v. Prudential Ins. Co.*, 7 Kulp (Pa.), 246. Upon the general rule it is held that if a contract is valid by the laws of one state and invalid by those of another, the parties are presumed to incorporate in the contract the law which would make it operative: *Carey v. Mackey*, 82 Me. 516; 17 Am. St. Rep. 500. But it is also held that courts will enforce contracts valid by the laws of the state or country

**§ 151. Valued Policy may be Shown to be a Wager.**

Since wager policies were valid prior to the act 19 George II., chapter 37, the value in a valued policy ought, it would seem, to have been conclusive whether merely speculative or founded on a real interest. But subsequent to the statute, Lord Mansfield, in *Lewis v. Rucker*,<sup>27</sup> while declaring that it was only necessary for the assured to prove some interest in case of valued policies to take them out of the statute,<sup>28</sup> yet he adds that "the insured can never be allowed in a court of justice to plead that he has greatly overvalued or that his interest was a trifle only," and that "if it should come out in proof that a man had insured two thousand pounds, and had interest on board to the value of a cable only," the statute could not be defeated by such an evasion.<sup>29</sup> This doctrine of Lord Mansfield is, of course, based upon the statute, and should be held applicable in all cases where there is legislative prohibition against wagering contracts, and in those cases where a wager policy is held void on the ground of public policy, there would seem to be no reason why the same rule should not govern.<sup>30</sup> But in *Alsop v. Insurance Company* it is decided that there cannot in strictness be a gaming policy under the laws of Massachusetts unless both parties intend to wager, and that if the valu-

wherein they were made, unless clearly contrary to good morals or repugnant to the policy or positive statutes of the jurisdiction in which it is sought to be enforced: *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23; *Robinson v. Queen*, 87 Tenn. 445; 10 Am. St. Rep. 690. And a contract made in Connecticut after sunset on Sunday, being valid in that state, may be enforced in Rhode Island, although the law of the latter state prohibits business in one's ordinary calling during all Sunday. The enforcement of such a contract does not involve a breach of good morals: *Brown v. Browning*, 15 R. I. 222; 2 Am. St. Rep. 908.

<sup>27</sup> 2 Burr. 1171.

<sup>28</sup> See *Barclay v. Cousins*, 2 East, 544; *Kane v. Com. Ins. Co.*, 8 Johns. (N. Y.) 229.

<sup>29</sup> 1 Marshall on Insurance, ed. 1810, \*136, et seq., Mr. Wood (1 Wood on Fire Insurance, 2d ed., sec. 38, p. 94) says that "a partial interest in the property insured, bearing a small proportion to the sums insured if the policy is valued, does not save the policy from being a mere wager, unless the assured stands in such a relation to the property that, as to all the balance of the sum insured, he stands as trustee for the owner."

<sup>30</sup> 1 Sum. (O. C.) 451.

ation is a mere cover for a wager it will be set aside and the insured may recover according to his actual interest.<sup>31</sup>

**§ 152. Policy Valid at Inception Cannot Become Wager.**—Where a life insurance policy is valid at its inception, the insured may dispose of it at his pleasure, nor can it be afterward converted into a wager policy by any use of it by the insured subsequent to effecting a valid contract.<sup>32</sup>

**§ 153. Wager Policies—Loss Should be Total.**—In wager policies the loss must be absolutely total. This follows from the fact that the contract is not based on any insurable interest, and necessarily there can be no liability for a partial loss. And for the reason that the insurer could claim no benefit from what may have been saved, the clauses existed in wager policies “free of average,” and “without benefit of salvage.”<sup>33</sup>

**§ 154. Wager Policies, What are and are not.**—A policy of insurance taken out on the life of another by a beneficiary, who has no pecuniary interest in the continuance of the life so insured, is a wagering policy and void. But a person may, of his own accord, insure his own life, pay the premium himself, and make the policy payable upon his death to a third party who has no insurable interest in his life.<sup>34</sup> But it is also

<sup>31</sup> *Clark v. Ocean Ins. Co.*, 16 Pick. (33 Mass.) 239. See *Wolcott v. Eagle Ins. Co.*, 4 Pick. (21 Mass.) 429.

<sup>32</sup> *Valton v. National Assur. Soc.*, 22 Barb. (N. Y.) 9.

<sup>33</sup> See *Glendenning v. Church*, 3 Caines (N. Y.), 141; *Buchanan v. Ocean Ins. Co.*, 6 Cow. (N. Y.) 318. “It is usually conceived in the terms ‘interest or no interest,’ or ‘without further proof of interest than the policy,’ to preclude all inquiry into the interest of the insured. . . . The parties mean to play for the whole stake, and when the underwriter pays a loss, he cannot, as in the case of an insurance upon interest, claim any benefit from what may have been saved, and to preclude all claim of that sort, the words ‘free of average’ and ‘without benefit of salvage’ are always introduced into wager policies”: 1 Marshall on Insurance, ed. 1810, \*121.

<sup>34</sup> *Lemon v. Phoenix Mut. L. Ins. Co.*, 38 Conn. 294; *Hill v. United L. Ins. Assn.*, 154 Pa. St. 29; 35 Am. St. Rep. 807; *Nye v. Grand Lodge etc.*, 9 Ind. App. 131, 143; *Elkhart v. Houghton*, 103 Ind. 291, per Zollars, J.; *Heinlein v. Imperial L. Ins. Co.* (Mich.), 59 N. W. Rep. 615; *Goodrich v. Treat*, 3 Col. 408; *Ætna L. Ins. Co. v. France*, 94 U. S. 56; *Olmstead v. Keyes*, 85 N. Y. 593, per Earl, J.; *Bloomington*

held that one may insure his life and pay the premiums himself for the benefit of another who has no insurable interest, and that this is not a wager policy.<sup>35</sup> A certificate of membership in a benefit society which provides that the devisees or, in case of no will, the heirs of the member upon his death are to receive a designated sum, is not a wagering contract.<sup>36</sup> A policy of insurance on property already covered by a prior policy is a wager policy and void;<sup>37</sup> and an agreement to pay one hundred pounds in case Brazilian shares shall be sold at a certain sum on a certain day is void.<sup>38</sup> A religious society has no such insurable interest in the lives of its members, though largely supported by their contributions, as will enable it to procure insurance upon the life of any one of them.<sup>39</sup> So a marriage benefit insurance procured for the benefit of a third person not related to the member, but who was to pay the dues and assessments and to receive two-thirds of the proceeds when collected, is void as a wager, although the contract itself should be void on other grounds,<sup>40</sup> and where a woman took out a policy in her own name, and subsequently delivered the policy to her daughter, directing her to pay the premium and upon

*Mut. L. B. Assn. v. Blue*, 120 Ill. 121; 58 Am. Rep. 852, n.; 11 N. E. Rep. 331; citing *Insurance Co. v. Hogan*, 80 Ill. 39; *Rawls v. Life Ins. Co.*, 27 N. Y. 282; 84 Am. Dec. 280; *Fairchild v. Northeastern M. L. Assn.*, 51 Vt. 613; *Langdon v. Union Mut. L. Ins. Co.*, 14 Fed. Rep. 272; *Connecticut Mut. L. Ins. Co. v. Schaffer*, 94 U. S. 457; denying *Mutual B. Assn. v. Hoyt*, 46 Mich. 473; 9 N. W. Rep. 497. See *United Brethren etc. v. McDonald*, 122 Pa. St. 324; 9 Am. St. Rep. 111; *Martin v. Stubbings*, 126 Ill. 387; 9 Am. St. Rep. 620.

<sup>35</sup> *Hill v. United L. Ins. Assn.*, 154 Pa. St. 29; 35 Am. St. Rep. 807; *Overbeck v. Overbeck*, 155 Pa. St. 5. But see, as to absolute assignment to one having no interest being void as a wager, *Carpenter v. United L. Ins. Co.*, 161 Pa. St. 9; 41 Am. St. Rep. 880. See *Chidester v. Yard*, 155 Pa. St. 483, where money for premiums furnished by beneficiary without insurable interest. *Examine Brennan v. Prudential Ins. Co.*, 148 Pa. St. 199; *Riner v. Riner*, 166 Pa. St. 617.

<sup>36</sup> *Northwestern Masonic etc. Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810.

<sup>37</sup> *Amory v. Gilman*, 2 Mass. 1.

<sup>38</sup> *Paterson v. Powell*, 9 Bing. 320; 2 Moore & S. 399.

<sup>39</sup> *Trinity College v. Travelers' Ins. Co.*, 113 N. O. 244; 18 S. E. Rep. 175; 23 Ins. L. J. 53.

<sup>40</sup> *White v. Equitable Nupt. B. Union*, 76 Ala. 251; 52 Am. Rep. 325. See *James v. Jellison*, 94 Ind. 292; 48 Am. Rep. 161.

the insured's death to pay the funeral expenses and deliver the balance of the proceeds to the grandchild of the insured, it was held not a wagering transaction.<sup>41</sup> So a policy issued for the benefit of a person who is neither an heir nor a relation of the assured, and whose interest is not promoted by the latter's continuing alive, is in the nature of a wager policy, and void as against public interests;<sup>42</sup> and a policy on the life of another taken by one who has an insurable interest for the purpose of assigning it to a third person, who had no insurable interest, is void as a wagering policy in the assignee's hands.<sup>43</sup> Again, where the life of A. was insured for the benefit of B., who shortly thereafter, in pursuance of a prior understanding to that effect, assigned the policy to C., who had no insurable interest in A.'s life, C. paid the assessment and was recognized by the company as the assignee, and it was held that the contract was a wager on A.'s life and void, and that C. could not maintain an action on the policy.<sup>44</sup> So if there is a marked disproportion between the amount of the insurance and the debt, as in case where the former was three thousand dollars and the

<sup>41</sup> *Burke v. Prudential Ins. Co.*, 155 Pa. St. 295; 28 Atl. Rep. 445 22 Ins. L. J. 536.

<sup>42</sup> *Mutual B. Assn. v. Hoyt*, 46 Mich. 473. But see *Bloomington Mut. L. B. Assn. v. Blue*, 120 Ill. 121; 58 Am. Rep. 852, n.; 11 N. E. Rep. 331.

<sup>43</sup> *Keystone Mut. B. Assn. v. Norris*, 115 Pa. St. 446; 2 Am. St. Rep. 572. See *Equitable L. Ins. Co. v. Hazelwood*, 75 Tex. 339, 16 Am. St. Rep. 893, where it is held that one having an insurable interest in the life of another cannot take and hold by an assignment upon the life of such other, and a creditor can only take and hold such policy by assignment to an extent sufficient to secure his debt, and that the same rule applies to a beneficiary named in the policy but who has no insurable interest. But it is held in *Wright v. Mutual B. L. Assn.*, 118 N. Y. 237, 16 Am. St. Rep. 749, that the assignee of the payee of a certificate of life insurance has the right to recover the whole amount specified in the certificate, though the debt owed the payee by the person whose life was insured was less than the sum insured, or had been paid in the lifetime of insured, or though a portion of the sum provided by the certificate was designed by the payee in a contingency for the benefit of some person other than the payee in the policy: See *Id.*, notes 906-8; note, 9 Am. St. Rep. 630.

<sup>44</sup> *Keystone Mut. B. Assn. v. Norris*, 115 Pa. St. 446; 8 Atl. Rep. 638; 7 Cent. Rep. 204.



debt one hundred dollars, the contract is a wager and void;<sup>45</sup> and where one assigned a policy to secure a debt, and the disproportion between the debt and the amount insured was very great, the court declared it a wager, and in such case the creditor can retain only the amount of the debt and necessary expenses.<sup>46</sup> But in another case, where the amount insured was three thousand dollars and the debt seven hundred and forty-three dollars, although only three hundred dollars when the policy was taken out, it was held that the disproportion was not so great as to make it a wagering policy.<sup>47</sup> And where the assignee of a mutual benefit certificate for two thousand dollars paid three hundred dollars for the same, and agreed to pay subsequent dues and assessments thereon, it was held that in the absence of proof as to the expectancy of life of the insured the transaction was not void as a wagering one.<sup>48</sup> And it has been held in case of a mixed policy, partly a wager and partly an open one, that there could be a recovery in case of total loss.<sup>49</sup> Fire insurances on time by open policies of the future material productions of the assured in the course of his business, or in his trade or calling, are valid contracts of indemnity, and not wager policies.<sup>50</sup> Again, whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, the insurance of such interest is not a wager.<sup>51</sup>

**§ 155. Interest Policy Defined.**—An interest policy is one in which it appears that the insured has an actual, assign-

<sup>45</sup> *Cooper v. Schaefer* (Pa.), 20 Week. Not. Cas. 123; 11 Atl. Rep. 548.

<sup>46</sup> *Cooper v. Weavers' etc. Co.* (Pa. S. C. 1887), 11 Atl. Rep. 780.

<sup>47</sup> *Grant v. Kline*, 115 Pa. St. 618; 9 Atl. Rep. 150. See *Fitzpatrick v. Hartford L. & A. Ins. Co.*, 56 Conn. 116; 13 Atl. Rep. 673; *Cammack v. Lewis*, 15 Wall. (U. S.) 643; *Ulrich v. Reinvehl*, 143 Pa. St. 238; 24 Am. St. Rep. 534; *Batdorff v. Fehler* (Pa. S. C. 1887), 8 Cent. Rep. 230; *Insurance Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180; *Amick v. Butler*, 111 Ind. 578; 60 Am. Rep. 722, and note, 729.

<sup>48</sup> *Nye v. Grand Lodge etc.*, 9 Ind. App. 131.

<sup>49</sup> *De Costa v. Frith*, 4 Burr. 1966, 1970.

<sup>50</sup> *Sawyer v. Dodge Co. Mut. Ins. Co.*, 37 Wis. 503.

<sup>51</sup> *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7; 21 Am. St. Rep. 716.

able, insurable interest in the subject matter, and this is the import of the general form of contract now in use.<sup>52</sup> In cases of fire risks the policies are interest policies.<sup>53</sup>

**§ 156. Open Policy Defined.**—An open policy is one in which the value is not fixed, but is left to be definitely determined in case of loss.<sup>54</sup> An open policy is frequently necessitated by reason of the character of the subject matter, as in case of an insurance upon a class rather than upon a particular or specific thing, or where the property insured has changed as to specific articles at the time of loss, although the class is of the same character as at the inception, as is instanced by merchandise in store, or the risk may be fluctuating as to quantity and location.<sup>55</sup> In an open policy it is held that the plaintiff must prove his interest and the value of his property or he cannot recover,<sup>56</sup> but the bill of lading of the outward cargo is no proof of the interest of the plaintiff in the homeward cargo.<sup>57</sup>

**§ 157. Running of Policies—Blanket Policies—Floating Policies.**—A running policy contemplates successive

<sup>52</sup> See *Sawyer v. Dodge Co. Mut. Ins. Co.*, 37 Wis. 539. See *Williams v. Smith*, 2 Caines (N. Y.), 13; 1 May on Insurance (Parsons), sec. 33; *Black's Law Dictionary*, 908, "Policy."

<sup>53</sup> 1 Wood on Fire Insurance, 2d ed., 95, sec. 39.

<sup>54</sup> See *Snowden v. Guion*, 101 N. Y. 458; *Snell v. Delaware Ins. Co.*, 4 Dall. 430. "The expression 'open policy' is also sometimes used in reference to one kept open for new subscriptions, or one on cargo kept open for new subjects of insurance, in which latter case the voyage and risks are described in the body of the policy, and additional amounts or new cargoes are afterward entered from time to time at the foot of the instrument, by merely specifying the amount or by naming a different vessel, or specifying whatever circumstance distinguishes the risk or subject from those described in the body of the policy": 1 Phillips on Insurance, 3d ed., 25, sec. 27; *Richards on Insurance*, sec. 14; 2 *Bouvier's Law Dictionary*, 430; *Comp. Laws Dak.*, 1887, sec. 4150; *Lester, Rowell & Hill's Ga. Code*, 1882, sec. 2833.

<sup>55</sup> 1 Wood on Fire Insurance, sec. 40, p. 95; *Richards on Insurance*, sec. 14; 1 May on Insurance, 3d ed., secs. 30, 31.

<sup>56</sup> *Millaudon v. Western Ins. Co.*, 5 La. (9 La. O. S.) (top page 20) 27, 29 Am. Dec. 433; *Beale v. Pettit*, 1 Wash. (C. C.) 241.

<sup>57</sup> *Beale v. Pettit*, 1 Wash. (C. C.) 241. See as to averment and proof of interest, *Illinois Mut. F. Ins. Co. v. Marseilles Mfg. Co.*, 1 Gilm. (Ill.) 236; *Gilbert v. North American Ins. Co.*, 23 Wend. (N. Y.) 43;

insurances whereby the object of the policy may from time to time be defined as to the subject, places, and amounts of insurance by additional indorsements as agreed upon by the parties.<sup>58</sup> A floating policy applies to goods of a class or kind which from its fluctuating, changing nature differs as to specific articles, as in case of a stock of merchandise or fluctuating goods where the insurance covers to a certain amount goods of the same character and description successively in store,<sup>59</sup> and the goods on hand at the time of loss may not be the specific ones in stock at the inception of the risk, or it may be applied to goods which cannot be well described, because fluctuating or shifting as to quality or location, as goods in warehouses, etc. Blanket and floating policies are sometimes issued to factors or to warehousemen, intended only to cover margins uninsured by other policies, or to cover nothing more than the limited interest which the factor or warehouseman may have in the property which he has in charge.<sup>60</sup>

35 Am. Dec. 543; *Dickerman v. Vermont Mut. F. Ins. Co.*, 67 Vt. 99; 30 Atl. Rep. 808; *Kentucky L. & A. Ins. Co. v. Hamilton*, 63 Fed. Rep. 93; 11 U. S. C. C. A. 42.

<sup>58</sup> See *Schaefer v. Baltimore M. Ins. Co.*, 33 Md. 109; *Kennebec v. Augusta Ins. Co.*, 6 Gray (72 Mass.), 204; *Carver Co. v. Manufacturers' Ins. Co.*, 6 Gray (72 Mass.), 215; *Stephens v. Australasian Ins. Co.*, L. R. 8 Com. P. 18; *Wells v. Pacific Ins. Co.*, 44 Cal. 397; *Deering's* Annot. Civ. Code, Cal., sec. 2597; *Levissee's* Dak. Code, sec. 1523; *Comp. Laws* Dak., 1887, sec. 4152; *Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 7; *Orient M. Ins. Co. v. Wright*, 23 How. (U. S.) 401.

<sup>59</sup> *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405, 411, 416; 88 Am. Dec. 337. "The policy in question having been issued to a mercantile firm, the company must be deemed to have had in view the fluctuating nature of a partnership business, and the changes of relative interest incident to that relation. These might be very important to the assured, though wholly immaterial to the risk": *Id.*, 411. "It was manifestly the intention of the parties to the policy that it should cover to the amount of the insurance any goods of the character and description specified in the policy which, from time to time during its continuation, might be in the store. A policy for a long period upon goods in a retail shop applies to the goods successively in the shop from time to time. Any other construction of a policy of insurance upon a stock in trade continually changing would render it worthless as an indemnity." . . . The insurance was intended to cover the mercantile stock of which the assured were proprietors, stored from time to time in the building in which the business was conducted": *Id.*, 415, 416, citing *Hooper v. Hudson F. Ins. Co.*, 17 N. Y. 425.

<sup>60</sup> *Home Ins. Co. v. Baltimore Warehouse Co.*, 3 Otto (93 U. S.), 541,

§ 158. **Open Policies—What are.**—Whether a policy is open or valued depends upon the intention of the parties to be ascertained by a legal construction of the whole instrument and the question is frequently difficult of determination.<sup>61</sup> Where the value of wheat shipped can be determined, in case of its loss, only by proof of its market price, no value being fixed in the certificate, the policy is an open, not a valued, one.<sup>62</sup> So a policy of insurance for eight hundred dollars on a certain dwelling-house, which sum does not exceed two-thirds of the value of the house, as appears from the application which was made a part of the policy, which also contains a stipulation that the company will pay "all loss or damage" not exceeding the sum named within ninety days after notice and proof of loss, is an open and not a valued policy.<sup>63</sup>

§ 159. **Valued Policy Defined.**—A valued policy is one wherein the value of the subject matter is agreed upon beforehand at a specified sum.<sup>64</sup> It estimates not merely the value of the property or interest insured, but values the loss, and is equivalent to an assessment of damages, or is in the nature of liquidated damages in case of loss.<sup>65</sup> And where

per Strong, J. Policy of insurance may be made to cover property changing daily in its specific articles, as a stock of goods: *Lester, Rowell & Hill's Ga. Code, 1882, sec. 2797.*

<sup>61</sup> See *Wallace v. Insurance Co.*, 4 La., O. S. (2 La. 559), 289; *Cushman v. Northwestern Ins. Co.*, 34 Me. 487; *McKim v. Phoenix Ins. Co.*, 2 Wash. (C. C.) 89; *Cox v. Insurance Co.*, 3 Rich. (S. C.) 31, 332; 45 Am. Dec. 771; *Riley v. Hartford Ins. Co.*, 2 Conn. 368; *Ogden v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 273; *Brown v. Quincy etc. F. Ins. Co.*, 105 Mass. 396; 7 Am. Rep. 538; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. St. 367; *Mellen v. National Ins. Co.*, 1 Hall (N. Y.), 500; *Laurent v. Chatham Ins. Co.*, 1 Hall (N. Y.), 50, 51; *Deering's Annot. Civ. Code, Cal.*, sec. 2595; *Levissee's Dak. Code, sec. 1526; Comp. Laws Dak.*, 1887, sec. 4150.

<sup>62</sup> *Williams v. Continental Ins. Co.*, 24 Fed. Rep. 767. And see cases in last note.

<sup>63</sup> *Farmers' Ins. Co. v. Butler*, 38 Ohio St. 128.

<sup>64</sup> *Cox v. Charleston etc. Ins. Co.*, 3 Rich. (S. C.) 331; 45 Am. Dec. 771; *Schaefer v. Baltimore M. Ins. Co.*, 33 Md. 109; *Comp. Laws Dak.*, 1887, sec. 4151; *Deering's Annot. Civ. Code, Cal.*, sec. 2596; *Levissee's Dak. Code, sec. 1527.*

<sup>65</sup> *Lycoming Ins. Co. v. Mitchell*, 48 Pa. St. 367. See *Shaw v. Felton*, 2 East, 114, per Mr. Justice Laurence.

there is an absolute loss of any article distinctly valued in the policy, the loss is to be estimated according to the valuation, it being in the nature of liquidated damages.<sup>66</sup> Valued policies may be made upon the ship, or on ship and freight and under the same policy, or upon freight or goods, and valuation may be in policies upon profits. Valued policies are also effected upon fire risks.<sup>67</sup> A valued policy does not cover property which is fluctuating or changeable, but applies to that which is fixed or to specific articles,<sup>68</sup> or it is used where it is difficult or impossible to ascertain the amount of interest of the insured in the subject matter, "as where returns are expected from abroad, the exact value and even the nature of which are uncertain. So in case of a prize where the real value of it can only be ascertained when it is brought into port and sold, and in every instance where the owners have been prevented from receiving regular or satisfactory advices from which the true amount of their interest might be ascertained."<sup>69</sup>

**§ 160. Valued Policy—What the Valuation Includes.**  
The valuation determines *prima facie* the amount of interest

<sup>66</sup> *Harris v. Eagle F. Co.*, 5 Johns. (N. Y.) 1368.

<sup>67</sup> *Coolidge v. Gloucester M. Ins. Co.*, 15 Mass. 341 (insurance of ship and freight each separately valued, and liability for total loss of freight, even though overvalued); *Davy v. Hallett*, 3 Caines (N. Y.), 16 (on a valued policy on freight; if there be an inchoate right to save, and the transaction *bona fide*, the value cannot be inquired into); *Crawford v. Hunter*, 8 Term. Rep. 10, n. (case of value to be declared upon ship and goods; loss happened before any declaration of value could be made); *Minturn v. Columbia Ins. Co.*, 10 Johns. (N. Y.) 75 (case of valuation on cargo); *Mavo v. Maine F. & M. Ins. Co.*, 12 Mass. 259 (insurance on ship valued, assured making no representation as to ownership, and was owner of one-third only, and was held entitled to recover whole loss); *Mumford v. Hallett*, 1 Johns. (N. Y.) 433 (where a printed blank policy on cargo was used, and the blank filled up for an insurance on profits, and the valuation in writing, when taken in connection with the printed words, was a valuation of the goods and not of the profits; every policy on profits must of necessity be a valued, and not an open policy); *Watson v. Insurance Co. of North America*, 3 Wash. (C. C.) 1 (valued policy on ship, valuation generally conclusive); *Post v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 79 (one-quarter of ship valued at sum insured; recovery for whole loss for sum insured; valuation applicable to interest insured and not to whole ship).

<sup>68</sup> 1 Wood on Fire Insurance, 2d ed., 96, sec. 41.

<sup>69</sup> 1 Marshall on Insurance, ed. 1810, \*288.

of the insured<sup>70</sup> and a gross valuation should include the premium, unless the manner of valuing or a construction of the policy indicates otherwise.<sup>71</sup> And it is also held that the owner of a ship and cargo may insure in a valued policy to the amount of the prime cost of the goods and the premium and the cost of freight thereon to the first port, the insurance being to two ports in the West Indies.<sup>72</sup> Though in estimating the value of the vessel the valuation in the policy, exclusive of the premium, is, it is held, to be taken as the value of the vessel.<sup>73</sup> It is held that in case of a partial loss under a valued policy on a vessel the insurer pays that proportion of the actual loss as the sum insured sustains to the value of the vessel.<sup>74</sup>

**§ 161. Valued Policy—How far Valuation Conclusive.** As a general rule a valued policy is conclusive of the value of the subject covered and the assured is entitled to recover the whole amount of the valuation in the policy in case of total loss by the perils insured against, unless the valuation is fraudulent or enormously excessive,<sup>75</sup> or unless the policy be a wager.

<sup>70</sup> *Feise v. Aguilar*, 3 Taunt. 506, per Mansfield, J.; *Shaw v. Felton*, 2 East, 115; 1 Marshall on Insurance, ed. 1810, \*290; 1 Arnould on Marine Insurance (Perkins' ed. 1850), 317, sec. 125; 2 Id. (MacLachlan's ed. 1887), 303, et seq.

<sup>71</sup> *Mayo v. Maine etc. Ins. Co.*, 12 Mass. 259, where premium was held included; *Mipturn v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 75 (premium, prime cost, and charges included); *Brooks v. Oriental Ins. Co.*, 7 Pick. (24 Mass.) 259 (premium included); *Ogden v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 273 (premium included but held an open policy); 2 Phillips on Insurance, 3d ed., 16. 1200, 1201; 1 Marshall on Insurance, ed. 1810, \*238, 2 Id. 621, who says: "The value in the policy being always considered as the fair amount of the prime cost and charges."

<sup>72</sup> *Pritchett v. Insurance Co. of North America*, 3 Yeates (Pa.), 458. It is said in *Lewis v. Rucker*, 2 Burr. 1171, that the effect of the valuation is to fix conclusively the prime cost. Prime cost and charges included: *McKim v. Phoenix Ins. Co.*, 2 Wash. (C. C.) 94; Id. 189.

<sup>73</sup> *Orrok v. Commonwealth Ins. Co.*, 21 Pick. (38 Mass.) 456; 32 Am. Dec. 271. In *Lewis v. Rucker*, 2 Burr. 1167, 1169, the valuation was considered the prime cost.

<sup>74</sup> *Western Assur. Co. v. Southwestern Transp. Co.*, 68 Fed. Rep. 923; 16 U. S. C. O. A. 65.

<sup>75</sup> *Griswold v. Union etc. Ins. Co.*, 3 Blatchf. (C. C.) 231; *Whitney v. American Ins. Co.*, 3 Cow. (N. Y.) 210; *Howes v. Union Ins. Co.*, 16 La. Ann. 235; *American Ins. Co. v. Whitney*, 5 Cow. (N. Y.) 712; Com-

But the rule as to conclusiveness of the valuation only applies as between parties to the same policy. Thus, where a portion of the insured's interest in the ship was valued at six thousand pounds, and insured six hundred pounds, and in another policy upon another portion of his interest in the ship the valuation was fixed at eight thousand pounds, and she was insured six thousand pounds, the valuation in the first policy does not limit the insured to the sum he may recover on the other, for the policy upon which the suit is brought is conclusive between the parties thereto, and transactions between the insured and third parties cannot be considered unless the sum received amounts to a complete indemnity. In this case the insured showed that the ship was worth over eight thousand pounds.<sup>76</sup> And the value stated in the application is also binding upon the parties, and after a loss the assured is not at liberty to show that in fact the property was worth a much larger sum.<sup>77</sup> Where a policy of fire insurance was issued to plaintiff, "the amount insured being not more than three-fourths of the value of the property as stated by the applicant," it was held that this valuation was conclusive, in the absence of fraud, although a subsequent proviso restricted the whole amount of insurance, if an additional policy was obtained, to "three-fourths of the actual value of the property at the time of loss," and although there was a covenant in the application (but not in the policy) that such valuation should not be conclusive.<sup>78</sup> If the same valuation is fixed under two policies upon the same subject, the insured is conclusively bound and cannot show a greater value. Even though the subject insured be in fact worth more than the sum fixed, the valuation limits the recovery.<sup>79</sup>

*monwealth Ins. Co. v. Sennett*, 37 Pa. St. 205; 78 Am. Dec. 418; *Papasco Ins. Co. v. Briscoe*, 7 Gill & J. (Md.) 293; 28 Am. Dec. 219; *Millandon v. Western Ins. Co.*, 9 La., O. S. (5 La. 20), 27; 29 Am. Dec. 433; *Kane v. Commercial Ins. Co.*, 8 Johns. (N. Y.) 229; *Lockwood v. Sangamo Ins. Co.*, 46 Mo. 71; *Watson v. Insurance Co. of North America*, 3 Wash. (C. C.) 7.

<sup>76</sup> 4 Camp. 227, per Lord Ellenborough.

<sup>77</sup> *Holmes v. Charlestown etc. Ins. Co.*, 10 Met. (Mass.) 211; 43 Am. Dec. 428.

<sup>78</sup> *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 297; 7 Am. Rep. 522.

<sup>79</sup> *Irving v. Richardson*, 1 Moody & R. 153.

**§ 162. Valued Policy—Effect of Overvaluation—Fraudulent Valuation.**—When the insured has some interest at risk, and there is no fraud, a valuation of the subject insured in the policy is held conclusive upon the parties in law and equity notwithstanding an overvaluation,<sup>80</sup> unless such overvaluation be grossly excessive, but this is in itself presumptive evidence of fraud,<sup>81</sup> although not sufficient.<sup>82</sup> But if the owner of property insured knowingly exaggerates the value of the property to an amount far beyond the cost price and the market value, and the insurer relies upon the statement of such excessive value in entering into the contract, such overvaluation is a conclusive presumption of fraud, sufficient to annul the contract.<sup>83</sup> The courts, however, are little disposed to permit the insurer to object to a valuation which has been deliberately fixed upon in good faith,<sup>84</sup> and an overestimate by the insured of the value of his property and the amount of the loss, if unintentional and with no purpose of defrauding the company, will not preclude a recovery.<sup>85</sup> And where there is a slight overestimate which may be accounted for by a difference of opinion, and the amount of the policy is within the ac-

<sup>80</sup> *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475; *Davy v. Hallett*, 8 Caines (N. Y.), 16; 2 Am. Dec. 241; *Lynchburg F. Ins. Co. v. West*, 76 Va. 575; 44 Am. Rep. 177; *Patapsco Ins. Co. v. Biscoe*, 7 Gill & J. (Md.), 293; 28 Am. Dec. 219; *Cushman v. Northwestern Ins. Co.*, 34 Me. 487; *Lockwood v. Sangamo Ins. Co.*, 48 Mo. 71; *Gardner v. Columbian Ins. Co.*, 2 Cranch (C. C.) 550; *Carson v. Marine Ins. Co.*, 2 Wash. (C. C.) 468; *Mumford v. Hallett*, 1 Johns. (N. Y.) 434; *Behren v. Germania F. Ins. Co.*, 64 Iowa, 19.

<sup>81</sup> *Sturm v. Atlantic Ins. Co.*, 63 N. Y. 77.

<sup>82</sup> See sec. 25 herein.

<sup>83</sup> *Sturm v. Great Western Ins. Co.*, 40 How. Pr. (N. Y.) 423.

<sup>84</sup> *Brook v. Louisiana St. Ins. Co.*, 8 Mart. (La.) 322 (4 N. S. 640); *Fuller v. Boston Mut. Ins. Co.*, 4 Met. (45 Mass.) 206; *Miller v. Alliance Ins. Co.*, 7 Fed. Rep. 649. See *Franklin F. Ins. Co. v. Vaughan*, 2 Otto (92 U. S.), 516; *Helbig v. Svea Ins. Co.*, 54 Cal. 156; 35 Am. Rep. 72; *Cox v. Aetna Ins. Co.*, 29 Ind. 586; *National Bank v. Insurance Co.*, 5 Otto (95 U. S.), 673; *Huth v. New York etc. Ins. Co.*, 8 Bosw. (N. Y.) 538.

<sup>85</sup> *Vergerant v. German Ins. Co.*, 86 Wis. 425; *Protection Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411; *Fire & Marine Ins. Co. v. Short*, 68 Ind. 316; *Phillips v. Merrimack etc. Ins. Co.*, 10 Cush. (Mass.) 350; *Behrens v. Germania F. Ins. Co.*, 64 Iowa, 19; *Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Ill. App. 216; *Lynchburg F. Ins. Co. v. West*, 76 Va. 575; 44 Am. Rep. 177.



tual value, and the property was examined by the agent before the risk was accepted, the fact that there is a warranty as to value does not make such overestimate a sufficient ground for avoiding the policy.<sup>85</sup> So when the sum slightly exceeds the value of the thing insured and the freight added to the point of destination, the valuation is conclusive,<sup>87</sup> and where the excess of a bona fide valuation of the ship was twelve thousand five hundred dollars and that of the freight and outfits ten thousand three hundred dollars, such overvaluation was held not fraudulent, and the valuation was recovered.<sup>88</sup> But if statements as to value are made warranties, the assured is obligated to place a fair and reasonable value upon the property, otherwise the policy may not be enforced;<sup>89</sup> and a false warranty as to value will annul the policy, as where the value is warranted to be the value, it goes beyond the expression of opinion.<sup>90</sup> An overvaluation of property in an application for insurance will not avoid policy, where the policy contains no condition to that effect, and where the agent of the insurance company knows or can judge of the value of the property, and accepts the application without objection; although an overvaluation is a circumstance which may be considered, in connection with others, in determining whether the insured destroyed the property for the purpose of defrauding the company, where that is relied upon as a defense.<sup>91</sup> The fact that the assured was an ignorant German,

<sup>85</sup> *Hubbard v. North British etc. Ins. Co.*, 57 Mo. App. 197. But see case noted in text at end of this section. That overvaluation not conclusive, see *Ocean Ins. Co. v. Fields*, 2 Story (C. C.), 59; *Bonham v. Iowa etc. Ins. Co.*, 25 Iowa, 328; *Behrens v. Germania F. Ins. Co.*, 64 Iowa, 19; *Harrington v. Fitchburg Mut. F. Ins. Co.*, 124 Mass. 126; *Miller v. Alliance Ins. Co.*, 7 Fed. Rep. 649.

<sup>87</sup> *Pritchett v. Insurance Co. of North America*, 3 Yeates (Pa.), 463, 464.

<sup>88</sup> *Phoenix Ins. Co. v. McLoon*, 100 Mass. 475.

<sup>89</sup> *Sun Fire Office v. Wich* (Col. App. 1894), 39 Pac. Rep. 537.

<sup>90</sup> *School District v. State Ins. Co.*, 61 Mo. App. 597. See *Carson v. Jersey City F. Ins. Co.*, 43 N. J. L. 300; 39 Am. Rep. 584. But see *Wheaton v. North British Ins. Co.*, 76 Cal. 415; 18 Pac. Rep. 758; 9 Am. St. Rep. 216.

<sup>91</sup> *Insurance Co. of North America v. McDowell*, 50 Ill. 120; 99 Am. Dec. 497.

and did not understand English, is held no excuse for his rating his house at double its value in effecting insurance on it.<sup>92</sup> And it is held that a gross exaggeration of the value prevents a recovery,<sup>93</sup> and fraudulent overvaluation avoids.<sup>94</sup> So it is also held that if a policy of fire insurance is conditioned to be void for overvaluation, it is avoided by any substantial overvaluation, whether fraudulent or innocent.<sup>95</sup>

§ 163. **Valued Policies—Statutory Regulations.**—Several states have adopted valued policy laws<sup>96</sup> relating to fire

<sup>92</sup> *Nassauer v. Susquehanna Mut. F. Ins. Co.*, 100 Pa. St. 507.

<sup>93</sup> *Whittle v. Farmville Ins. Co.*, 3 Hughes (C. C.), 421.

<sup>94</sup> *Hersey v. Merrimack Co. Ins. Co.*, 7 Fost. (27 N. H.) 149; *Gerhauser v. North British etc. Ins. Co.*, 7 Nev. 174. See *Oshkosh etc. Co. v. Mercantile Ins. Co.*, 31 Fed. Rep. 200; *Protection Ins. Co. v. Hall*, 15 B. Mon. (Ky.) 411; *Dupree v. Virginia H. Ins. Co.*, 22 N. C. 417; *Chapman v. Pole*, 22 L. T., N. S., 306; *Williams v. Phoenix F. Ins. Co.*, 61 Me. 67. As to overvaluation in open policy being immaterial, see *Aurora F. Ins. Co. v. Johnson*, 46 Ind. 315; *Cohen v. Charleston etc. Ins. Co.*, Dudl. L. (S. C.) 147; 31 Am. Dec. 549. As to value stated in application, see *Holmes v. Charleston etc. Ins. Co.*, 10 Met. (Mass.) 211; 43 Am. Dec. 428; *Hersey v. Merrimack Co. Ins. Co.*, 7 Fost. (27 N. H.) 149; *Williams v. Phoenix F. Ins. Co.*, 61 Me. 67; *Wheaton v. North British etc. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216; 18 Pac. Rep. 758; *Merchants' & Mechanics' Ins. Co. v. Schroeder*, 18 Ill. App. 216; *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 417.

<sup>95</sup> *Boutelle v. Westchester F. Ins. Co.*, 51 Vt. 4; 31 Am. Rep. 666. See *Lycoming F. Ins. Co. v. Rubin*, 79 Ill. 402; *Bobbitt v. Liverpool etc. Ins. Co.*, 66 N. C. 70; *Keeler v. Niagara Ins. Co.*, 16 Wis. 523; 84 Am. Dec. 714.

<sup>96</sup> In case of total loss by fire of real property, a liquidated demand exists to the full amount of the policy: *Sandels & Hill's Dig. Stat. Ark.*, 1894, p. 982, sec. 4140; *Laws 1889*, p. 57, c. 42. Valued policy defined and valuation of a policy of marine insurance is conclusive as between the parties: *Comp. Laws Dak.*, 1887, secs. 4151, 4243; *Levisse's Dak. Codes*, secs. 1527, 1619. See, also, *Deering's Annot. Civ. Code Cal.*, secs. 2596, 2736. Insurance on real property against loss by fire, tornado, or lightning, and property wholly destroyed—Amount of insurance is conclusively the true value, and the true amount of loss or measure of damages applies to rent of property and permits adjustment of loss by rebuilding: *Laws Del.*, Rev. Code, 1852, as amended 1893, pp. 586, 587, c. 695, vol. 18; c. 696, vol. 19. Marine insurance—Value stated in the policy is always subject to be reduced by proof: *Lester, Rowell & Hill's Ga. Code*, 1882, sec. 2834. Fire insurance—Assured may recover full amount of his loss, provided the same is within amount insured. The value of property is to be estimated at the time of loss. Contingent profits are not part of such value: *Lester, Rowell & Hills'*

risks on real property or on buildings, making the value in the policy the measure of damages and conclusive in case of a loss within the intent of the statute, notwithstanding there may be stipulations in the policy that the true value shall be proved, and notwithstanding other clauses inconsistent with the statute. And the actual value of the real estate when destroyed, or the value when insured, and the consequent actual loss to the insured have been held wholly immaterial. The statute is a part of the contract, and the amount written in the policy is regarded as liquidated damages agreed upon by the parties con-

Ga. Code, 1882, secs. 2814, 2815. Amount specified in policy is *prima facie* evidence of insurable value at date of policy. Actual value at loss, and depreciation in value may be shown by insurer, but he is liable for actual value at date of loss: McClain's Annot. Code of Iowa, 1888, p. 434, sec. 1734. Statements of value in application are representations, and not warranties: Rev. Stat. Me. 1883, p. 445, c. 49, title iv., sec. 20. Not permitted to deny under fire policies that property is worth at time of issuing full amount specified, and in case of total loss the measure of damage is the amount insured, less depreciation in value between time of issuing and time of loss, and, in case of partial loss, then relative value: 2 Rev. Stat. Mo., 1889, p. 1401, secs. 5897, 5898, 5899. Valued policy defined—If there is no valuation in the policy, the measure of indemnity in fire insurance is the expense, at the time loss is payable, of replacing thing lost or injured in condition it was at the time of injury: Booth's Annot. Civ. Code, Mon., 1895, sec. 3553. Policy on real property against loss by fire, tornado, or lightning, and property wholly destroyed: Amount written in policy is conclusive of true value and true amount of loss, and measure of damage applies to policies and renewals: Brown & Wheeler Comp. Stat. Neb., 1893, p. 536, c. 43, sec. 43. Statements of value not warranties—If insured buildings be totally destroyed, the sum insured is to be taken to be the value of insured's interest, unless there is fraud, or, if partially destroyed, entitled to actual damages not exceeding sum insured: Pub. Stat. N. H. 1891, p. 485, c. 170, secs. 1, 5. Valued policy defined, and valuation in marine policy conclusive between parties, except there is fraud. In fire policies, if there is no valuation, the measure of indemnity is the full amount stated in the policy. The effect of valuation is the same as in marine policy: Rev. Code N. Dak., secs. 4497, 4593, 4607. Policy against loss by fire or lightning—Agent of insurer to examine building and fix value, and in absence of increase of risk or fraud, in case of total loss, whole amount mentioned in policy or renewal governs; if partial loss, full amount shall be paid: Smith & Ben. Ver. Rev. Stat. Ohio, 6th ed., 1890, sec. 3643. If there is no violation of the policy, the measure of indemnity is the full amount stated: Stat. Okla., 1890, p. 631, sec. 3159, c. 44, art. 3, sec. 4. Steam-boiler insurance—Companies to be liable for amount specified in the policy: Laws Pa., 1887, p. 186, No. 128, Pepper

clusively in such contract.<sup>87</sup> So it is held in California that a contract between a life insurance company and the insured, whereby the latter waives his statutory rights, is ultra vires and void.<sup>88</sup> These laws have been declared valid and founded upon considerations of public policy, being intended to guard against overinsurance and against carelessness, and every other incentive to destroy property or permit its destruction for the purpose of gain on the part of the insured.<sup>89</sup> Notwithstanding

& Lewis' Dig., p. 2387, par. 101. Fire policy is liquidated on demand, in case of total loss of real property, for full amount specified: 2 Sayles' Tex. Civ. Stat., art. 2971, title 53, c. 3. Real property insured and wholly destroyed—Amount specified in the policy is conclusively true value where insured, and true amount of loss or damage when destroyed: 1 Sanborn & Berry's Annot. Stat. Wis., p. 1165, sec. 1943.

<sup>87</sup> Reilly v. Franklin Ins. Co., 43 Wis. 449; 7 Ins. L. J. 391; 28 Am. Rep. 552; Oshkosh Gas Light Co. v. Germania F. Ins. Co., 71 Wis. 457; United F. Ins. Co. v. Kukral (Cuy. Co. Ohio C. C. 1893), 30 Week. L. Bull. 356; Cayon v. Dwelling-House Ins. Co., 68 Wis. 510, 516; Sun Mut. Ins. Co. v. Holland, 2 Tex. App. Civ. Cas., sec. 446; Thompson v. St. Louis Ins. Co., 43 Wis. 459; German Ins. Co. v. Eddy (Neb. 1893), 22 Ins. L. J. 468; 19 L. R. Annot. 557; Baumessell v. Bruners F. Ins. Co., 43 Wis. 463; Seyk v. Willers Nat. Ins. Co., 74 Wis. 67. See Bourgeois v. Northwestern Nat. Ins. Co. (Wis. 1894), 57 N. W. Rep. 347; Sun Mut. Ins. Co. v. Hock (Ham. Co. Ohio C. C. 1894), 32 Week. L. Bull. 341. That policy may contain clause not provided for by statute, see Armstrong v. Western Manufacturers' Mut. F. Ins. Co. (Mich. S. C. 1893), 54 N. W. Rep. 637, under How. Stat. Mich. 4349.

<sup>88</sup> In this case the condition related to forfeiture: Griffith v. New York L. Ins. Co., 101 Cal. 627; 40 Am. St. Rep. 96. As to right to fix conditions as to the cancellation under sections 3634 to 3667 of Revised Statutes of Ohio, and obligation to comply with statute, see Phoenix Mut. F. Ins. Co. v. Brecheisen (Ohio S. C. 1893), 23 Ins. L. J. 56; 35 N. E. Rep. 53. That condition as to limitation of action (Rev. Stat. Ind., 1881, sec. 3770) controls condition in policy, see Small v. Westchester F. Ins. Co. (U. S. C. C.) 51 Fed. Rep. 789. That statute relating to statements in application controls, see Hermany v. Fidelity Mut. L. Assn., 151 Pa. St. 17; 24 Atl. Rep. 1064. Where policies are not signed as required by statute, and the policy failed to specify that funds alone are liable, a deed of settlement is required, and the policy has no validity: Hambro v. Hull etc. F. Ins. Co., 3 Hurl. & N. 789. See Prince of Wales L. etc. Co. v. Harding, El. B. & E. 183. The fact that a statutory condition is not inserted does not, it is held, prevent its being read as a condition in the contract, even though there are other conditions not printed as variations: Findley v. Fire Ins. Co. of North America (1894), 14 Can. L. T. 340.

<sup>89</sup> See Reilly v. Franklin Ins. Co., 43 Wis. 449; 7 I. L. J. 391; 28 Am. Rep. 552; Ostrander on Fire Insurance, ed. 1892, secs. 243, 505, et seq. JONES, VOL. I.—15

ing the rule *stare decisis*, we are inclined to the belief that the system is open to serious objections, for the reason that the assured can gain nothing in case of undervaluation, and the same inducement to incendiarism exists in case of overvaluation. Nor can such legislation protect against overinsurance unless the insurer incur a great expense and loss of time in determining the actual value of property. Again, the legislation is restrictive, and abridges the rights of parties to freely enter into contracts, and it would seem that it would best conform to the doctrine of indemnity that the value of the property at the time of loss should be proved.<sup>100</sup>

**§ 164. Valued Policies—Partial Loss.**—In the case of a partial loss under a valued policy the valuation may be inquired into to a certain extent<sup>101</sup> merely for the purpose of ascertaining how it may be applied, rather than for the purpose of setting it aside.<sup>102</sup> So in a case in Mississippi,<sup>103</sup> the partial loss was estimated upon the basis of the valuation in the policy, the loss there being held to be the difference between the agreed value and the damaged value, adding the costs and ex-

<sup>100</sup> A recent writer declares that "these laws are not to be commended, because they impose too arbitrary a standard, and may be used as an instrument of fraud": (Richards on Insurance, ed. 1892, sec. 20); and another author, while maintaining their validity, admits that the policy of these laws "contemplates an abridgment of the natural rights of the parties to make contracts": Ostrander on Fire Insurance, sec. 245, p. 510. The system of "valued policies" is open to "grave objections, for apart from the labor and cost of valuing a thousand properties in preparation for the total destruction of four or five, it is obvious, if the value fixed is less than the real value, there is no advantage to the insured, but the contrary; and if it is greater than the real value, then no doubt the insured might make a profit by a fire, but this would offer an inducement to carelessness, if not to incendiarism. In the United States, however, several state legislatures have been so imprudent as to force the issue of 'valued policies'": 13 Ency. Britt. 164.

<sup>101</sup> *Forbes v. Manufacturers' Ins. Co.*, 1 Gray (67 Mass.), 375; *Clark v. United Ins. Co.*, 7 Mass. 365; 5 Am. Dec. 50; *Watson v. Insurance Co. of North America*, 3 Wash. C. C. 1. See *Lewis v. Rucker*, 2 Burr. 1170; *Harris v. Eagle F. Co.*, 5 Johns. (N. Y.) 368; *Forbes v. Aspinall*, 13 East, 327, per Lord Ellenborough; *Murray v. Insurance Co.*, 2 Wash. C. C. (U. S.) 186.

<sup>102</sup> *Forbes v. Aspinall*, 13 East, 327, per Lord Ellenborough. See *Howell v. Protection Ins. Co.*, 7 Ohio, 287.

<sup>103</sup> *Natchez Ins. Co. v. Buckner*, 4 How. (5 Miss.) 63.

penses.<sup>104</sup> That the loss should be adjusted so far as practicable upon the basis of the valuation seems to be the settled doctrine.<sup>105</sup>

§ 165. **Valued Policy—Pro Rata Recovery.**—Although a valued policy fixes the price, this is not an admission that so much is at risk,<sup>106</sup> as where by mistake or design only a part of the goods have been shipped, a recovery can only be had of such proportion of the valuation as the goods at risk bear to the whole value.<sup>107</sup> So the amount of a bottomry bond may be deducted from the real value,<sup>108</sup> and if one insures property expected to be on board ship to a certain amount upon a valued policy, and much less is in fact shipped, he is entitled to recover, in case of loss, a proportion pro rata notwithstanding the valuation.<sup>109</sup>

§ 166. **Valued Policies—"Valued at" not Conclusive.** Usually in a valued policy the phrase appears "valued at —," and the blank being filled, the agreed value is settled. But the policy remains open if this blank is unfilled and no valuation of the subject insured is specified in the indorsement;<sup>110</sup> and since the question of intention controls, the policy must

<sup>104</sup> See *Stanton v. Natches Ins. Co.*, 5 How. (4 Miss.) 744; *Le Pypre v. Farr*, 2 Vern. 716.

<sup>105</sup> 2 Phillips on Insurance, sec. 1203, who says: "The valuation is to be adhered to and applied, so far as it is practicable, in settling partial as well as total losses": See *Lewis v. Rucker*, 2 Burr. 1167; *Forbes v. Manufacturers' Ins. Co.*, 1 Gray (67 Mass.), 371. Mr. Marshall says (2 Marshall on Insurance, ed. 1810, \*631): "Where there is a partial loss upon a valued policy, but the value in the policy exceeds the interest of the assured, it is the constant usage to adjust a partial loss in the same manner as if the policy were an open one, and the computation must therefore be by the real interest on board, and not by the value in the policy," although under a Massachusetts decision it seems that the valuation may be opened: *Clark v. United F. & M. Ins. Co.*, 7 Mass. 365; *Brewer v. American Ins. Co.*, 123 Mass. 78.

<sup>106</sup> *Haven v. Gray*, 12 Mass. 76.

<sup>107</sup> *Wolcott v. Eagle Ins. Co.*, 4 Pick. (21 Mass.) 429; *Tobin v. Hartford*, 17 Com. B., N. S., 527. See *Atlantic Ins. Co. v. Lunar*, 1 Sand. Ch. (N. Y.) 91; *Patrick v. Eames*, 3 Camp. 441.

<sup>108</sup> *Watson Ins. Co. of North America*, 3 Wash. (C. C.) 1.

<sup>109</sup> *Alsop v. Insurance Co.*, 1 Sum. (U. S.) 451.

<sup>110</sup> *Snowden v. Guion*, 101 N. Y. 458, 467, reversing s. c. 18 Jones & S. (N. Y.) 137; *Hemingway v. Eaton*, 13 Mass. 108.

disclose an intent to make it a valued one,<sup>111</sup> for the words "valued at" are not in themselves conclusive. So in a case where the policy contained this clause: "The said goods and merchandise hereby insured are valued at — as indorsed"; the blank was not filled up. It was stipulated therein as follows: "No shipment to be considered as insured until approved and indorsed on this policy by the assurer. . . . Indorsements valued at the same, provided they do not vary from the cost more than — per cent," and it was held that the policy was an open, not a valued, one; that the statement in the indorsement of the sum insured was not a valuation.<sup>112</sup> And where the policy contained the following words: "The said goods and merchandise are valued at eighteen francs, valued at four dollars and forty-four cents," it was held to be an open policy, these words merely ascertaining at what rate the value of the cargo paid for in francs was to be reduced into our money.<sup>113</sup> And a policy enumerating certain articles with figures indicating dollars placed opposite to each, does not constitute a valued policy.<sup>114</sup>

**§ 167. Valued Policies — Prior Insurance.**—Where insurance was effected on a vessel, valuing her at the amount insured, being four thousand dollars, and they afterward effected another policy to the amount of four thousand dollars, valuing the ship at six thousand dollars, without notice of the prior insurance, and a partial loss occurred which the plaintiffs claimed is a charge upon the whole amount insured in the second policy, it was held that defendants were liable for as much of the agreed value of the vessel as was not covered by the prior insurance, being to the extent of two thousand dollars, and that it was not necessary to give notice of the first insurance to the defendants.<sup>115</sup> In another case it is held that on a double insurance, if the first policy be open and the other valued, and the insured cedes to the insurers on the open policy as much as they

<sup>111</sup> *Cox v. Charleston Ins. Co.*, 4 La. O. S. (2 La. 559), 289.

<sup>112</sup> *Snowden v. Guion*, 101 N. Y. 458.

<sup>113</sup> *Ogden v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 273.

<sup>114</sup> *Luce v. Springfield F. & M. Ins. Co.*, 1 Flap. (C. C.) 281.

<sup>115</sup> *Murray v. Insurance Co. of Pennsylvania*, 2 Wash. (C. C.) 186.

insured, and obtains payment as for a total loss, and he has short property on board, he can only recover on the valued policy for the loss of the property he could cede on the same.<sup>116</sup> In a Massachusetts case the question arose whether the goods were covered by a valued policy or an open one. Under the valued policy goods were included which were shipped between the first day of February and the fifteenth day of July, the second policy to cover goods shipped subsequently to July 14th and prior to October 15th. The goods in question were shipped on the 15th of July, and the court held that they were not within the protection of the first policy.<sup>117</sup> Where a cargo is insured by diverse policies, in some of which the rate of exchange is fixed at which the prime cost of the cargo shall be valued, in ascertaining the amount of the interest of the insured, upon settlement of those policies in which the rate of exchange is fixed, the whole cargo is to be valued at that rate, without regard to the rate by which the values were ascertained in the other policy.<sup>118</sup>

**§ 168. Valued Policies — What are.**—Life insurance policies are valued in that the amount is fixed as the sum to be paid, without deduction, in case of loss, or the happening of the specified contingency,<sup>119</sup> and in so far as mutual benefit certificates resemble life policies, the same rule applies as it does also in accident policies where a certain amount is to be paid in case of death resulting from injury. So every policy on profits is necessarily a valued policy,<sup>120</sup> and policies on ships are gener-

<sup>116</sup> *Craig v. Murgatroyd*, 4 Yeates (Pa.), 161.

<sup>117</sup> *Atkins v. Boylston F. & M. Ins. Co.*, 5 Met. (46 Mass.) 439.

<sup>118</sup> *Pleasants v. Maryland Ins. Co.*, 8 Cranch (U. S.), 55. (This was not a valued policy.)

<sup>119</sup> *Chisholm v. National etc. L. Ins. Co.*, 52 Mo. 215; 14 Am. Rep. 416, per Wagner, J.; *Miller v. Eagle L. & H. Ins. Co.*, 2 E. D. Smith (N. Y.), 268; *Connecticut M. L. Ins. Co. v. Schaefer*, 4 Otto (94 U. S.), 463, per Bradley, J.; *St. John v. American L. Ins. Co.*, 2 Duer (N. Y.), 419; 13 N. Y. 38; 64 Am. Dec. 529, per Crippen, J.; *Cammack v. Lewis*, 15 Wall. (U. S.) 643.

<sup>120</sup> *Mumford v. Hallett*, 1 Johns. (N. Y.) 433; *Patapsco Ins. Co. v. Coulter*, 3 Pet. (U. S.) 239; *Riley v. Hartford Ins. Co.*, 2 Conn. 368. See *Eyre v. Glover*, 16 East, 218; *Barclay v. Cousins*, 2 East, 544; 2 *Phillips on Insurance*, 3d ed., 1209.



ally valued.<sup>121</sup> When a policy recites that the amount insured is not more than three-fourths of the value of the property, "as appears by the proposal of the insured," and the application of the insured contains a valuation of the property, the policy is a valued one.<sup>122</sup> Where a running policy of marine insurance contained a stipulation, "No shipments to be considered as insured until approved and indorsed on this policy by this company," the valuation to be fixed by the indorsement, it was held that the policy was not an open, but a valued, one; that each indorsement of a shipment and the valuation thereof constituted a separate and distinct contract of insurance, and that the contract was not complete, as to any specific shipment, until the indorsement of value on the policy.<sup>123</sup>

§ 169. *Mixed Policy Defined.*—Sometimes a policy may be open as to certain property and valued as to other property, as where a policy is for ten thousand dollars, being on a vessel and freight, and the vessel is valued at eight thousand dollars, but the blank for valuation of the freight is not filled. It is a mixed policy, open as to the freight, and valued as to the vessel,<sup>124</sup> or as in case of a house and furniture, the house being valued and the furniture not,<sup>125</sup> although in this case the valuation was held not conclusive; or a policy may be mixed as to the duration, as where it sets out the termini but limits the risk by time.<sup>126</sup> Where a policy insured a vessel for a specified time for a particular voyage outward, after the voyage was made but before the time had expired the same underwriter insured the vessel for the return voyage, by a certificate made "under and subject to the conditions of the existing policy," it was held that no liability accrued for a loss occurring after the time specified in the original policy.<sup>127</sup>

<sup>121</sup> *Examine* 14 A. & E. of L. 340.

<sup>122</sup> *Nichols v. Fayette etc. Ins. Co.*, 1 Allen (83 Mass.), 63.

<sup>123</sup> *Schaefer v. Baltimore etc. Ins. Co.*, 33 Md. 109.

<sup>124</sup> *Riley v. Hartford Ins. Co.*, 2 Conn. 368.

<sup>125</sup> *Post v. Hampshire Mut. Ins. Co.*, 12 Met. (53 Mass.) 555; 46 Am. Dec. 702.

<sup>126</sup> 14 Am. & Eng. Ency. of Law, 335. See *Manly v. United M. & F. Ins. Co.*, 9 Mass. 85; *Martin v. Fishing Ins. Co.*, 20 Pick. (37 Mass.) 389; 1 Arnould on Marine Insurance, 6th ed., 373.

<sup>127</sup> *Pitt v. Phoenix Ins. Co.*, 10 Daly (N. Y.), 281.

§ 170. **Time Policy Defined.**—A time policy limits the duration of the risk by definite periods of time by fixing its beginning and end;<sup>128</sup> as where a policy was effected December 17, 1845, for one year commencing and ending at 12 o'clock noon.<sup>129</sup> In the case here instanced it was held that the meridian of the place where the contract was made determined the parties' rights.<sup>130</sup> "Sometimes attempts are made to construe time policies as voyage policies, but the courts have not encouraged them."<sup>131</sup>

§ 171. **Time Policy—Computation of Time.**—It is held that "from the day of the date" excludes the day, while "from the date" includes it;<sup>132</sup> while in *Pugh v. Leeds*<sup>133</sup> it was determined that no distinction exists between those terms.<sup>134</sup> In *Perry v. Provident Insurance etc. Company*,<sup>135</sup> the rule of computation was that time computed from the act done includes the day, but computed from the day of the act excludes the day. In this case the policy was from noon to noon where the injury should "occasion death within ninety days from the happening thereof," and it was held that an accident happening at nine o'clock A. M., causing death at the same hour, on the ninety-first day, was not within the policy,<sup>136</sup> although in a later case in the same state<sup>137</sup> concerning a deposit of a copy of the

<sup>128</sup> *Grouse v. Sea Ins. Co.*, 24 Wend. (N. Y.) 209.

<sup>129</sup> *Walker v. Protection Ins. Co.*, 29 Me. 317.

<sup>130</sup> *Id.*

<sup>131</sup> *Porter's Law of Insurance*, 2d ed., 100, citing *Crowley v. Cohen*, 3 Barn. & Adol. 478; *Joyce v. Kennard*, L. R. 7 Q. B. 78.

<sup>132</sup> *Sir Robert Howard's case*, 2 Salk. 625; *Holt*, K. B. 195 (case of policy of assurance on H.'s life for a year. He died on the last day, and insurer was held liable). See *Blake v. Crowninshield*, 9 N. H. 304; *Weeks v. Hull*, 19 Conn. 376; 1 Am. Dec. 249; *Isaacs v. Royal Ins. Co.*, 39 L. J. Ex. 189; 22 L. J. Q. B. 681; *Cornell v. Moulton*, 3 Denio (N. Y.), 12. Where the goods were to be shipped between February 1 and July 15, 1840, it was held that the policy did not cover shipments made on the fifteenth day of July, 1840: *Atkins v. Boylston F. & M. Ins. Co.*, 5 Met. (46 Mass.) 439.

<sup>133</sup> *Cowp.* 714.

<sup>134</sup> See *Atkins v. Boylston F. & M. Ins. Co.*, 5 Met. (46 Mass.) 440.

<sup>135</sup> 99 Mass. 162.

<sup>136</sup> See, also, *Perry v. Provident L. Ins. Co.*, 103 Mass. 242.

<sup>137</sup> *Bemis v. Leonard*, 118 Mass. 502; 19 Am. Rep. 470. This is a leading case, reviewing the authorities at length.

writ and of the return of the attachment in the town clerk's office, it was held that in computing time from the date or from the day of the date or from a certain act or event, the day of the date is to be excluded, unless a different intention is manifested by the instrument or statute under which the question arises.<sup>138</sup> So in a South Carolina case the day of passage of an act laying an embargo for a specified time from its passage was excluded, and a policy made on that day was held valid.<sup>139</sup> Again, in case of insurances in mutual benefit societies, where the member is required to pay an assessment within a specified number of days from the date of notice or from the time notice is "served on" or "sent to" the assured, that day is excluded.<sup>140</sup> The intent of the parties as to the commencement and end of the risk, however, governs if it can be ascertained from the policy or subject matter.<sup>141</sup> Where a policy of insurance is expressed to be "from August 1, 1854, to August 1, 1854," it may be shown by reference to the indorsements made by the insurers on the back of the policy, to the application, which is made a part of the policy, and to the amount of the premium and deposit note, to be an insurance for five years from August 1, 1854.<sup>142</sup> In conclusion, the general rule on the question of exclusion or inclusion of the day, so far as it is possible to formulate one, seems to be that the question is, in the absence of some governing statute, one of construction, dependent upon the intent of the parties evidenced and deducible from the contract and attendant circumstances, so far as the latter are admissible in evidence. "If, however," says Mr. Parsons, "there is nothing in the language which clearly indicates the intention of the parties, time should be computed exclusive of the day when the contract was made."<sup>143</sup> Mr. May says: "The circumstances and intent of the parties are to control; and such construction should be given as will operate

<sup>138</sup> Case cited with approval in *Lane v. Holman*, 144 Mass. 222.

<sup>139</sup> *Lorent v. South Carolina Ins. Co.*, 1 Nott. & McC. (S. C.) 505.

<sup>140</sup> *Protection L. Ins. Co. v. Palmer*, 81 Ill. 88. See sec. 1839, herein.

<sup>141</sup> *O'Connor v. Towns*, 1 Tex. 107; 1 Phillips on Insurance, 3d ed., 918, et seq., p. 499, et seq.; 2 May on Insurance, Parsons, sec. 400.

<sup>142</sup> *Liberty Hall Assn. v. Housatonic Mut. F. Ins. Co.*, 7 Gray (73 Mass.), 261.

<sup>143</sup> 2 Parsons on Contracts, 7th ed., bottom p. 796, \*p. 663.

most to the ease of the party entitled to favor, and by which rights will be secured and forfeitures avoided.”<sup>144</sup> We are inclined, however, to the opinion that time computed from the date or day of date, or from some certain act or event, excludes the day or event,<sup>145</sup> particularly so when such a construction would come within the rule *contra proferentem*, whereby in insurance policies the construction is against the insurer and most favorable to the assured, or where such a rule would operate to save forfeitures.<sup>146</sup>

**§ 172. Time Policy—Trading Voyage—Nature of Contract.**—A policy, on time simply, where no ports are mentioned or goods laden or to be laden, the risk to commence from the loading on board the vessel, necessarily implies a trading voyage with liberty to dispose of the goods insured; and the policy attaches, however often the goods may be changed;<sup>147</sup> and it is held that a time policy, upon the cargo, on a trading voyage is in the nature of a new insurance upon the new cargo or the goods remaining at risk, every time the cargo is increased or diminished otherwise than by the perils insured against, but the total amount for which the underwriters are to be made liable during the whole time or voyage cannot be an amount exceeding his subscription, except for general average and ex-

<sup>144</sup> 2 May on Insurance, 3d ed., sec. 400.

<sup>145</sup> *Chiles v. Smith*, 13 B. Mon. (Ky.) 460; *Beeman v. Cook*, 48 Vt. 201; 21 Am. Rep. 123; *Blackman v. Nearing*, 43 Conn. 56; 21 Am. Rep. 634. It was held in both these cases that in computing the time of the limitation of an action on a promissory note the day on which it matures is to be excluded: *Warren v. Slade*, 23 Mich. 1; 9 Am. Rep. 70 (here judgment was barred by statute ten years after judgment was entered. The day of entry was held excluded). See as to general rule, *Lang v. Phillips*, 27 Ala. 311; *Mercantile M. Ins. Co. v. Titherington*, 5 Best & S. 765; *Judd v. Fulton*, 10 Barb. 118; *Wetmore v. Mutual etc. Assn.*, 23 La. Ann. 770; notes 7 Am. Dec. 250; 46 Am. Rep. 410; *Pearpoint v. Graham*, 4 Wash. (C. C.) 232; 2 *Parsons on Contracts*, 7th ed., bottom p. 635, n. a, \*p. 504, bottom pp. 795-98, \*pp. 662-65, where the authorities are exhaustively considered; *Blake v. Crowninshield*, 9 N. H. 304; 7 *Wait's Actions and Defenses*, 231. The codes of many states make special provisions governing the matter.

<sup>146</sup> See chapter viii herein, and sections 220-24.

<sup>147</sup> *Coggeshall v. American Ins. Co.*, 3 Wend. (N. Y.) 283; *Grousset v. Louisiana Ins. Co.*, 24 Wend. (N. Y.) 209.

penses incurred in preserving or attempting to recover the property for his benefit. If after the delivery of a portion of the first cargo, the residue, to an amount equal to or exceeding the subscription, be lost on a voyage to another port, the insurer is liable to the amount of his subscription.<sup>148</sup>

§ 173. **Time Policy—Continuance after Expiration of Time.**—A time policy may also be made to be continued in force from the date of its expiration until notice of discontinuance, as where a marine policy provided that it should "continue in force from the date of expiration until notice is given to this company of its discontinuance, the assured to pay for such privilege pro rata for the time used," and the term of the policy expired October 5th. The assured sent on October 9th a month's premium, stating that it was "one monthly premium from October 5th to November 5th" on the insurance "as specified in the policy," and it was determined that the company was liable for a loss occurring November 6th, and that the payment was not notice to discontinue the policy, nor an election to continue it another month, and no longer, but that the policy continued in force by its own terms until notice given by assured of discontinuance.<sup>149</sup>

§ 174. **Voyage Policy Defined.**—A voyage policy is one which establishes the duration of the risk and specifies the voyage by setting out the termini, as where the words are used "at and from New York to San Francisco" they describe the voyage during which the risk is to continue.<sup>150</sup> It may cover risks of transportation by land and may also include a voyage out and home, as a single risk.<sup>151</sup>

<sup>148</sup> *American Ins. Co. v. Griswold*, 14 Wend. (N. Y.) 399, 479.

<sup>149</sup> *Greenwich Ins. Co. v. Providence etc. S. S. Co.*, 119 U. S. 481. See sections hereinafter as to extending the time where the ship is "on a passage," etc.

<sup>150</sup> *Melcher v. Ocean Ins. Co.*, 59 Me. 217.

<sup>151</sup> *Bernon v. Woodbridge*, 2 Doug. 781; *Patapsco Ins. Co. v. Biscoe*, 7 Gill & J. (Md.) 293. "Voyage policies against land risks are sometimes taken out, but are not so common as time policies. They cover the things insured between certain geographical limits. Practically, they impose upon the insurer the liability of the common carrier between the two ends of the journey. The risk begins in such policies

**§ 175. Voyage Policy—Voyage must Conform to Course Fixed by Usage.**—It is a well-settled rule of law that the underwriters are bound to know the usages of trade in which they are insurers, and to make their contracts in reference thereto,<sup>152</sup> and the insurer in estimating the premium is presumed to have considered the usual course of the voyage as fixed by mercantile usage between the termini, and describing the voyage in the policy is an express reference to the usual manner of making it as much as if every circumstance were mentioned.<sup>153</sup> Therefore, the voyage must conform to the usual course of sailing prescribed by mercantile usage between the places designated as the termini;<sup>154</sup> but if no usual course be fixed by usage, then the way should be that which the master, if of ordinary skill and discretion and acting according to his best judgment, shall determine to be the safest and most direct, and which shall conduct the adventure in the most advantageous and expeditious manner consistent with safety.<sup>155</sup> This subject of description of the voyage will, however, be more fully considered hereafter.

**§ 176. The Form of the Policy.**—A policy of insurance is the contract reduced to writing. It is a simple or parol contract, since it need not be under seal,<sup>156</sup> and is of very ancient date. But slight changes had been made therein prior to 1785, when the statute 25 George III., chapter 44, requir-

when the goods start or get into the carrier's hands, and continue from thence until arrival in the hands of the consignee or other specified determination of the transit, but it will not continue during a deviation. In some cases the carrier makes himself the insurer. Thus, railway companies will grant insurances on goods carried by them for the safe carriage of which they are not liable under the Carriers' Act": Porter's Law of Insurance, 2d ed., 100.

<sup>152</sup> *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33; *Grant v. Lexington etc. Ins. Co.*, 5 Ind. 23; 61 Am. Dec. 74; *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383; *Noble v. Kennoway*, 2 Doug. 511; *Salvador v. Hopkins*, 3 Burr. 1707.

<sup>153</sup> *Pelly v. Royal Ex. Assur.*, 1 Burr. 341; 1 Arnould on Insurance, 340.

<sup>154</sup> See Deering's Annot. Civ. Code, Cal., secs. 2692, 2693.

<sup>155</sup> See Deering's Annot. Civ. Code, Cal., sec. 2693.

<sup>156</sup> *Sanborn v. F. I. Ins. Co.*, 16 Gray (82 Mass.), 448; 77 Am. Dec. 419; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83.

ing the insertion of names in certain policies, was enacted.<sup>157</sup> Policies have been, however, very inaccurately and loosely drawn instruments, although it would necessarily follow that some degree of certainty would have been attained through usage, lengthened experience, and frequent constructions thereof by the courts.<sup>158</sup> An examination of the numerous cases arising upon the construction of policies in the United States shows a lack of uniformity in form of policies written in this country, and owing to attempted modifications and introduction of new features, the policies here are varied.<sup>159</sup> The form, however, is not essential unless required by statute. Statutes, however, have been passed in several states adopting standard fire policies.<sup>160</sup> Emerigon, in considering whether

<sup>157</sup> Changes were made some years prior to 1785 by inserting a memorandum at the foot of the policy, and the words "as well in his own name as for and in the name and names of all and every person or persons to whom the same doth, may, or shall appertain in part or in all," and the words "as interest may appear": See stat. 25 Geo. III., c. 56 (1788). For statutory form of marine policy in England, see 1 Arnould's *Marine Insurance*, Perkins' ed. 1850, 20, \*21; 1 Id., MacLachlan's ed. 1887, 231, 232, who says it was printed in schedule 35 George III., c. 63, and reprinted in schedule 30 Vict., c. 23, Consolidated Stat. Ins. Law; *Gorman v. Lineating*, 2 Saund. 201, n. c; *Wolfe v. Horncastle*, 1 Bos. & P. 316, 320, Buller, J.

<sup>158</sup> In 1791 Lord Kenyon, in *Brough v. Whitmore*, 4 Term Rep. 208, says: "I remember it was said many years ago that if Lombard street had not given a construction to policies of insurance, a declaration on a policy would have been bad on a general demurrer, but that the uniform practice of merchants and underwriters had rendered them intelligible"; and Buller, J., in the same case, adds "that a policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument." See, also, *Marine Ins. Co. v. Woods*, 6 Cranch (U. S.), 45; *Simond v. Boydell*, 1 Doug. 270; *Marsden v. Reid*, 3 East, 578; *Yeaton v. Fry*, 5 Cranch (U. S.), 342.

<sup>159</sup> For form of certificate of benefit association and of its by-laws and rules, see *Lawler v. Murphy*, 58 Conn. 294. For forms of standard fire policies, see statutes noted in section 33, herein. For forms of policies in use in the commercial world in 1834, see *Vancher's Guide to Marine Insurance*, ed. 1834.

<sup>160</sup> See section 33, herein, as to states having such forms. So in Canada the statutes regulate the form of the policy: See *Hartney v. North British F. Ins. Co.*, 13 Ont. R. 581; *Citizens' etc. Co. v. Parsons*, 4 Com. Sup. Ct. R. 215. Marshall, however, in his work on *Insurances*, (vol. 1, ed. 1810), says: "There does not seem to be any reason for prescribing by law the contents of a policy of insurance any more than

it is "permitted to stipulate agreements contrary to the dispositions of the Ordonnance," says: "One may not derogate from the prohibitory dispositions of the Ordonnance" or "from the directions of the Ordonnance in points that are of essence of the contract. But it is permitted to vary from them in all points which not being prohibited by any express text concern neither the essence of the contract nor good morals nor public law, and such is the doctrine of the common law."<sup>161</sup>

§ 177. **Policy—What it Usually Contains.**—Although the form is not essential unless required by statute, and although the parties may enter into whatever legal and valid contract they choose, yet the policy usually contains, either in itself or by express reference to the application or other papers, (1) the names of the parties, (2) the consideration or premium, (3) duration or term insured, (4) the peril or risk or voyage insured, (5) the amount insured, (6) the subject matter or the description of the interest when necessary, (7) the warranties and conditions, (8) the attestation clause, signatures, dates, etc., and, if necessary, the seal.<sup>162</sup> This rule, however, is subject to

those of any other species of contract. . . . The common course appears to be the better one, namely, to leave parties to make such stipulations and in such terms as they may choose."

<sup>161</sup> Emerigon on Insurance, Meredith's ed. 1850, c. ii, sec. 8, p. 48. The Ordonnance de la Marine, art. 3 des Assur., makes certain provisions as to what the policy shall contain. Emerigon (id.) also says: "The Reglement of Barcelona and the Reglement of Amsterdam declare null and of no value all contracts of assurance made and passed in their prejudice, though the parties have stipulated and contracted to the contrary. This principle is too general"; then follows what we have above quoted in the text. As to effect of variations from statutory provisions concerning policy in Canada, see *Hartney v. North British F. Ins. Co.*, 13 Ont. R. 581; *Parsons v. Queen Ins. Co.*, 2 Ont. R. 45.

<sup>162</sup> The 30 Vict., c. 23 (1867), sec. 7, provides that no contract for sea insurance, other than that referred to in the Merchant Shipping Act, 1862, sec. 55, shall be valid unless expressed in the policy, and that every policy shall specify the particular risk or adventure, the names of the subscriber, or underwriter, and the sum or sums insured, and the omission of any of them shall avoid the policy; and see statute 25 & 26 Vict., c. 63, sec. 64; 28 Geo. III., c. 56, sec. 2. In California the statute provides as to what the policy must specify: Civ. Code Cal., sec. 2587. Mr. Marshall (*Marshall on Insurance*, ed. 1810,



many qualifications. Thus, it is not absolutely necessary to the validity of the policy in all cases that the name should appear,<sup>163</sup> nor need the nature and extent of the interest be specifically set out in every case,<sup>164</sup> and the valuation is sometimes not written in the policy. Thus, a cargo policy may provide

305-43), says "the usual requisites of a policy are ten," they relate to marine insurance, and are: 1. The name of the insured, his agent, or trustee; 2. The name of the ship and the master; 3. The subject matter of the insurance; 4. A description of the voyage with the commencement and end of the risk; 5. The perils insured against; 6. The powers of the insured in case of a misfortune; 7. The promise of the insurers and their receipt for the premium; 8. The common memorandum; 9. The date and subscription; 10. The stamp. This first requirement arose from the statutes 25 Geo. III., c. 44, and 28 Geo. III., c. 56. The second depends upon usage, since it is very ancient and exists in the forms of foreign policies. Mr. Maclachlan (1 Arnould on Marine Insurance, ed. 1887, 251) states the following as substantial requisites of a marine policy in England: 1. The name of some party, either really or nominally insured; 2. A description of the voyage or risk insured; 3. Of the subject insured; 4. Of the perils insured against; 5. The name of the ship and master (except where the insurance is on goods by ship or ships); 6. The premium or consideration for the contract; 7. The sums insured; 8. The subscription of the underwriter; 9. Dated; 10. Stamped before execution"; and he states the statutory requisites to be: 1. The insertion of the name of some party really or nominally assured; 2. The stamp; 3. The risk or adventure; 4. The names of the underwriters; 5. The sums insured; 6. At common law, the premium. This author also inserts what is known as the running down clause: Id. 251. This differs slightly from those given by Mr. Arnould (Perkins' ed., 1850), page 40.

<sup>163</sup> See *Weed v. London etc. Ins. Co.*, 116 N. Y. 106, 112; 22 N. E. Rep. 231, where the defendant by the policy in suit undertook to insure the "Estate of O. Richards" against loss or damage by fire, and the referee found as a fact that defendant intended to insure such persons and their interests in said premises as were or might be represented under said name or title. But see 30 Vict., c. 23, sec. 7; *Lee v. Massachusetts F. & M. Ins. Co.*, 6 Mass. 215, 216. A policy issued to one in his own name as "receiver for" a firm on their "one-half interest" in a certain building evidences clearly an intent to insure the receiver as the representative of the interest: *Steel v. Phoenix Ins. Co.*, 51 Fed. Rep. 715; 2 C. C. A. (U. S.) 463; 154 U. S. 518; 14 Sup. Ct. 1163 (court divided). See, also, 136 U. S. 287; 19 Ins. L. J. 481. As to policy to corporations in their name, see *Holbrook v. St. Paul Ins. Co.*, 25 Minn. 229; *Clark v. German Mut. F. Ins. Co.*, 7 Mo. App. 77; *Bon Aqua Imp. Co. v. Standard F. Ins. Co.*, 34 W. Va. 764; 12 S. E. Rep. 771.

<sup>164</sup> *Van Natta v. Mutual Sec. Ins. Co.*, 2 Sand. (N. Y.) 490, -94.

in the blank form that if no valuation be written herein then the property inserted is hereby valued at invoice cost on board. Nor is a written date essential,<sup>165</sup> except possibly in case of marine policies in England subscribed by Lloyds underwriters,<sup>166</sup> and stipulations relating to signing and countersigning are sometimes dispensed with.<sup>167</sup>

§ 178. **Execution of the Policy.**—The policy is executed by the insurer, and although it is not signed by the assured, except where certificates of membership in certain mutual benefit societies are required to be signed by the assured, and although the promise is by the assurer and not by the assured, except in cases where the premium is not presumed to have been prepaid, he is bound to an observance of all its valid conditions if he intends to claim the indemnity, or as in life policies, the sum specified, his right to recover depends upon a performance by the insured of the valid conditions of the policy, since the violation of conditions of any policy constitutes a valid defense by the insurer. A policy may be subscribed by the underwriter or by his duly authorized agent or attorney,<sup>168</sup> but in this country the business of insurance is carried on principally by chartered or incorporated companies or associations, and the policy or certificate is generally subscribed by the executive officers of the company, although the act of incorporation, charter, articles of association, or by-laws may designate certain officers or agents to attest the policy, and the policy may also provide for the countersignature of a certain agent as a condition precedent to its validity.<sup>169</sup> And where a contract for em-

<sup>165</sup> *Lee v. Massachusetts Ins. Co.*, 6 Mass. 218, 219. See sec. 157, herein. If oral agreement mentions no date, the risk begins immediately: *Potter v. Phoenix Ins. Co.*, 63 Fed. Rep. 382.

<sup>166</sup> 1 Arnould on Marine Insurance, MacLachlan's ed. 1887, 249, 250.

<sup>167</sup> *Myers v. Keystone Mut. L. Ins. Co.*, 27 Pa. St. 268; 67 Am. Dec. 462. See secs. 33-35, 528, 530-532, herein.

<sup>168</sup> *Guthrie v. Armstrong*, 5 Barn. & Ald. 628; 1 D. & K. 248.

<sup>169</sup> See secs. 528, 530-532, herein. See, also, secs. 39-41, herein; *Head v. Providence Ins. Co.*, 2 Cranch (U. S.), 150; *Union Mut. Ins. Co. v. Commercial M. M. Ins. Co.*, 19 How. (U. S.) 318; 2 Curt. (C. C.) 524; *Myers v. Keystone M. L. Ins. Co.*, 27 Pa. St. 268; 67 Am. Dec. 462; *Peoria F. & M. Ins. Co. v. Walser*, 22 Ind. 73. Form of execution of marine and fire policy: "In witness whereof, the — Insurance Com-

ployer's insurance provides for indemnity to the insured in case of liability to employees for damages for accidents and injuries sustained by them in the course of their employment, and also further provides for hospital treatment for sick or disabled employees, in consideration that the insured pays a monthly assessment based on the number of employees, such a contract, being in the name of the corporation as the insurer, may be signed officially by its president, and such subscription is valid.<sup>170</sup> But it is held that if the company's charter requires that contracts shall be signed by the president and countersigned by the secretary the subscription to be valid must be

pany has caused these presents to be signed by its duly authorized officers in the — state of — this — day of —, one thousand — hundred and —. —, secretary, —, president." Another marine form is: "In witness whereof, the president or vice-president of the said — Insurance Company hath hereunto subscribed his name and the sum insured, and caused the same to be attested by their secretary in — the — day of —, one thousand," etc. Memorandum clause: "—, secretary, —, president." Another form, fire policy: "In witness whereof, this company has executed and attested these presents this — day of —, 189—. —, secretary, —, president." Form of standard fire policy of Massachusetts: "In witness whereof, the said — company has caused this policy to be signed by its president, and attested by its secretary (or by such proper officers as may be designated), at their office in — (date)." Form of certificate of membership of mutual company: "In witness whereof, the said — company of — have caused this certificate to be signed by their president, and attested by their secretary in the city of —, state of —, this — day of —, A. D. 18—. —, president, —, secretary. Countersigned at — this — day of —, 18—. —, agent." Form of certificate in mutual benefit or beneficiary association: "In witness whereof, the said — association of —, state of —, has by its president and secretary signed, sealed, and delivered this certificate at its office in —, state of —, this day of —, 18—. —, president, —, secretary," affixing corporation seal. Form of life policy: "In witness whereof, the said — Life Insurance Company [or society] has caused this policy to be signed by two of the executive officers at its office in — this — day of —, A. D. one thousand —. —, secretary, —, actuary." Another form, life policy: "In witness whereof, the said — Life Insurance Company has by its president and secretary signed and delivered this contract at the —, this — day of —, one thousand —. —, secretary, —, president."

<sup>170</sup> National Prot. Assn. v. Prentice etc. Co., 49 Minn. 220; 51 N. W. Rep. 916.

made in that way.<sup>171</sup> In case of marine policies in England private insurers underwrite with their own names, and Lloyds' policy is ordinarily executed by individual underwriters, and against each subscription is generally set in words and figures the date and also the sum insured.<sup>172</sup> And in fact the act incorporating the society of Lloyds<sup>173</sup> prohibits subscribing in the name of a partnership or otherwise than in the name of an individual, being an underwriting member of the society for each separate sum subscribed. The policy becomes, therefore, a separate contract with each underwriter obligating him to the extent of his subscription or for some proportionate part thereof in case of a partial or average loss, thereby precluding an action against the subscribers jointly, and necessitating a separate action against each underwriter. Partnerships should subscribe as such, and if there be a separate subscription by individual partners this does not preclude resort to partnership assets. The mode of subscription by companies may depend upon the act of incorporation, charter, or deed of formation. In case of subscription by what were known as insurance clubs in England some question has arisen as to the manner of subscription, and the specification of the sum or sums insured, owing to the principles upon which these organizations were originally formed, and the necessity of conforming with the requirements of the act of 1867, 30 Victoria, chapter 23, section 7, that each policy shall specify the names of the underwriters and the sum or sums insured. These clubs, however, are now registered under the Companies Act of 1862,<sup>174</sup> still preserving, as far as consistent with existing laws, their mutual features.<sup>175</sup>

<sup>171</sup> *Spitzer v. St. Marks Ins. Co.*, 6 Duer (N. Y.), 6. But see secs. 31, 32, 423, 425-27, herein.

<sup>172</sup> Form of subscription of English marine policy: "In witness whereof, we, the assurers, have subscribed our names and sums assured on ———"; then follows memorandum clause, then signatures and sums affixed as follows: "£ [figures]; A B [sum in words], — day of —, A. D.," for each underwriter the sum subscribed being specified, and date of each subscription affixed.

<sup>173</sup> 34 Vict. (1871), c. 21.

<sup>174</sup> 25 & 26 Vict., c. 89. See, also, 7 & 8 Vict., c. 110.

<sup>175</sup> Validity of policy where sums not specified: Policy in the common form by an insurance club, where the members are not responsible, Vol. I.—16.

**§ 179. Execution of Policy—Affixing Date.**—Although it is customary in this country to affix the date, a policy

sible for the solvency of each other, is valid, although the sums which they respectively insure are not specified on the face of the policy: *Dowell v. Moore*, 4 Camp. 166 (1815). No stamped policy executed and no recovery allowed, under 30 Vict., c. 23, secs. 7, 9: *Foster v. Liverpool M. Ins. Co.*, 9 L. R. Q. B. 418; 43 L. J. Q. B. 114, affirming 42 L. J. Q. B. 224 (1874). Unregistered association—Companies' Act: A mutual marine insurance association was not registered under Companies' Act. Rules provided that all persons insuring with the association should be members. No ship was to be insured for more than three-fourths its value. The person insuring paid a deposit of twenty-five shillings per cent on the amount for which he had insured it, ratably according to the amounts assured to them respectively. There were more than twenty members. An insured vessel was lost, and the amount was referred to arbitration. The insured assigned his claim, judgment was obtained, and a petition presented to wind up the association, as its company consisted of more than twenty members and was not registered. Its formation was forbidden by the Companies' Act, 1862, sec. 4, and the court discharged an order for winding up, as it could not recognize the association as having any legal existence: *In re Padstow etc. Assur. Assn.*, L. R. 20 Ch. 137 (1882); *In re Arthur Aver. Assn. etc.*, L. R. 10 Ch. 542 (1875). Contributions—Managing owner—Relations of members—Owners' liability clauses: One T. was the manager and part owner of a steamship, of which N., the defendant, was also part owner. T. became a member of plaintiffs' association and took out a policy with such association in respect to the steamship. T. became bankrupt, and, being unable to pay contributions due the association, action was brought to make N. liable as undisclosed principal. Lord Esher, M. R., said: "The action is brought against the defendant, the part owner of a ship, as the undisclosed principal of Tully, the ship's manager, who had taken out a policy on the ship in his own name, and had become thereby a member of the plaintiffs' association according to its rules. The question, therefore, arises whether the plaintiffs can sue the defendant as Tully's principal. There is much complication and difficulty in connection with these mutual assurance associations. In the case of *Lion v. Mutual Ins. Assn. v. Tucker* (49 L. R., N. S., 764; 12 Q. B. D. 176), I endeavored to explain the business relation of the members of such an association to each other. It is necessary to consider the form in which the parties have carried out those business relations in order to ascertain what remedies are available for the purpose of enforcing them. The first question which it may be material to consider is, whether the different members of the association have any remedies or rights of action, and if so, what as between themselves. It is obvious, as explained in the case I have referred to, that members cannot sue other members in respect of payments due from the other members as such to the association. Only the association can sue in respect to such payments. Then can members sue other members in respect of claims arising out of the insurance

bearing date the day the premium is paid, but not delivered till after its date, will take effect by relation from its date.<sup>176</sup> So

of ships? In the case of *Lion Ins. Assn. v. Tucker* (ubi sup.), I stated that the business relation between the members was that they were in reality both insurers and insured; but that business relation is carried out by means of a policy given under seal of the association. The members of each class are insurers and insured as between themselves and the other members of the class; they are insured, not by the whole association, but by a part only of the association, viz., the members of the same class. A member who had suffered a loss must, however, sue on the policy given by the association. In order to sue the other members of the class who are really his insurers, he would have to say that they were the principals of the association in giving him a policy under the seal of the corporation. I do not think he could do so. I think that in the case of such a contract as this under seal, it is not allowable to go behind the instrument to make undisclosed principals responsible because they are not parties, and have not attached their seals to the contract under seal. Moreover, it is to be observed that in this case the contract is that he is to be paid, in respect of the loss he has suffered, only the amount which the association can collect from the other members of the class. There would be this difficulty in suing the other members, viz., that they might have satisfied their liability by payment of their contributions to the association, and the member is not to receive his payment direct from them, but is to receive the sum collected by the association. There is no contract, as it seems to me, between the member who has suffered the loss and the other members, but only between him and the association, and such member, therefore, cannot sue the other members, although they are really his insurers. If a member could not sue, a person could not sue as his undisclosed principal. Then, as regards any action against the person alleged to be the undisclosed principal of a member by the other members, it would be impossible to allege that a person is an undisclosed principal, in respect of the contract, unless the parties who allege that he is a party to the contract as an undisclosed principal could be sued by him as well as by them. . . . I do not think that a person actually interested in a ship, who has authorized another person to enter into a policy in his own name with the association, is a party to the contract as an undisclosed principal, because, to make him so, it would be necessary to say that he is a member of the association to which he is wholly disclosed and unknown. The association was divided into three different classes, with a separate code of rules for each class, and the agreement in the policy was, 'that the association, under all their policies of insurance of the said class, shall be liable in the whole only to the extent of so much of the funds as the said association is able to recover from the members of the said class, and their respective heirs, executors, and administrators liable for the same, and which, under and by virtue of the

<sup>176</sup> *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18. See *Potter v. Phoenix Ins. Co.*, 63 Fed. Rep. 382.

the policy may relate back and take effect so as to cover a loss prior to its date where the contract has been completed;<sup>177</sup> although where the policy was executed and dated but not delivered, because the insured had not called for the same and paid the premium as required, the contract was held not completed.<sup>178</sup> And, as a general rule, the date is not conclusive evidence of the fact, and if the actual date of execution and delivery differs from and is subsequent to that specified, such fact may be shown, although it is questioned whether the error may be corrected in law courts where the execution and delivery precede the date written.<sup>179</sup> In a Massachusetts case a policy of fire insurance in the form required by statute<sup>180</sup> purported to insure a building for five years from its date, January 23, 1889. On that day the plaintiff called upon an agent of the defendant company and signed the application, and was told that it would be considered and decided upon later. About two weeks after that time he received notice from the agent that the policy was ready for him, and he did not call for it until about March 13, 1889, when he went to the agent's office,

rules of said class, are for the time being applicable for the purpose of paying claims under this and other policies issued in respect of the said class'": *United Mut. S. S. Assur. Assn., Lim., v. Nevill*, 6 Asp. Rep. Mar. Cas., N. S., 226 (1887), distinguished in *Ocean Steamship Ins. Assn. v. Leslie*, 6 Asp. Rep. Mar. Cas., N. S., 226 (1887). But where insurance was effected by managing owners, "as well in his or their own names as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all," etc., and contributions were to be paid by "assured," it was held that other part owners were liable as the "assured" for contributions, but it was questioned whether they became members of the association: *Great Britain 100 A1 Steamship Ins. Assn. v. Wyllie*, 6 Asp. Rep. Mar. Cas., N. S., 398 (1889), noting the last two cases above. Estoppel of member to deny validity of contract because not stamped or in writing: *Barrow-in-Furness Mut. S. Ins. Co., Lim.*, 5 Asp. Rep. Mar. Cas., N. S., 443, 527.

<sup>177</sup> *Commercial Ins. Co. v. Hallock*, 27 N. J. 645; affirming 26 N. J. 268. See sec. 105, herein.

<sup>178</sup> *Flint v. Ohio Ins. Co.*, 8 Ohio, 502. See sec. 100, et seq., herein.

<sup>179</sup> See *Jackson v. Bard*, 4 Johns. (N. Y.) 230, 233; *Hall v. Casenone*, 4 East, 477; *Lorent v. South Carolina Ins. Co.*, 1 Nott & McC. (S. C.) 505; 1 *Duer on Marine Insurance*, ed. 1845, 90; 1 *Phillips on Insurance*, 3d ed., p. 84, sec. 128.

<sup>180</sup> Stat. 1887, c. 214, sec. 60.

paid the premium, and it was delivered, and it was held that the contract did not take effect till March 13th.<sup>181</sup> But it is held in Ohio that where an application naming the day for the commencement of the risk has been sent to the office of the agent authorized to issue the policy, that the company is liable for a loss occurring after the date named and before the policy issued.<sup>182</sup>

**§ 180. Execution of Policy—Affixing Seal.**—A seal is not necessary in the absence of a statutory requirement or some provision of the company's or association's charter, act of incorporation, or articles of association.<sup>183</sup> It is decided in Maine that a printed impression of a seal is not a seal, and that upon a contract of insurance having thereon such an impression an action of *assumpsit* can be maintained, since it is not a sealed instrument.<sup>184</sup> So a scroll with the word "seal" affixed to an instrument not required to be sealed does not necessarily and conclusively show that a sealed instrument was intended.<sup>185</sup> If a policy is sealed and renewed for another year it is not necessary that the renewal receipt should be sealed, for the policy evidences the contract and covenant lies therein.<sup>186</sup> In many of the states there are legislative enactments by virtue of which policies of insurance do not require a seal.<sup>187</sup>

<sup>181</sup> *Wainer v. Milford Mut. F. Ins. Co.*, 153 Mass. 335.

<sup>182</sup> *Krumm v. Jefferson F. Ins. Co.*, 40 Ohio St. 225.

<sup>183</sup> See c. iii, herein. *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. (5 Barr.) 344, 345; *National etc. Ins. Co. v. Knaup*, 55 Mo. 154; *McCullough v. Talladiger Ins. Co.*, 40 Ala. 376; *Bank of United States v. Danbridge*, 12 Wheat. (U. S.) 67, et seq. See for general rule, 1 Morawetz on Private Corporations, 2d ed., secs. 338-41. See for exhaustive consideration of the entire subject of execution of corporate contracts, seals, etc., 4 Thompson on Corporations, title 9, c. cv, secs. 5015-39; *Id.*, art. 2. "Manner of executing sealed instruments by corporations": Secs. 5069, et seq.

<sup>184</sup> *Mitchell v. Union L. Ins. Co.*, 45 Me. 104; 71 Am. Dec. 529. See *Freeman's Supp. Stat. Me. 1885-95*, p. 271 (5); *Laws 1889*, c. 163, p. 153.

<sup>185</sup> *Clegg v. Le Messurier*, 15 Gratt. (Va.) 108.

<sup>186</sup> *Herron v. Peoria M. & F. Ins. Co.* 28 Ill. 235.

<sup>187</sup> *Rev. Stat. Ariz.*, 1887, sec. 253; 1 Mills' Annot. Stat. Col., 1891, sec. 2227; *Rev. Stat. Idaho*, 1887, sec. 2742; *Gen. Stat. Kan.*, 1889, vol. 1, sec. 3347; *Rev. Stat. Maine*, 1883, p. 445, c. 49, sec. 12; *Rev. Stat. Mont.*, 1887, p. 772, sec. 575. See 3 Sanders' Annot. Mon. Codes (1895),



§ 181. **Requisites of a Valid Policy.** — In case the form of the policy is not prescribed by statute and the contract is reduced to writing, it should contain either by itself or by reference to other papers the exact agreement between the parties set forth therein in clear, precise, and unambiguous terms. The policy should likewise embody all the requirements of a valid insurance contract;<sup>188</sup> for policies of insurance have ever been considered instruments of a solemn nature, though not under seal, and should embody in their terms expressly or by reference the whole contract between the parties.<sup>189</sup> It is upon this contract that the suit must be brought, where there is no fraud, duress, or mistake. All prior negotiations, proposals, and conversations are considered waived or merged in this written contract.<sup>190</sup> And no rule is better settled than that parol evidence is inadmissible to vary or control the plain and unambiguous terms of a written contract of insurance.<sup>191</sup>

secs. 3220-25; *Id.*, Civ. Code, secs. 2189-91; Neb. Comp. Stat., 1891, p. 529, c. 43, sec. 12; Comp. Laws N. Mex., 1884, sec. 1465; Rev. Code N. Dak., 1895, secs. 3891, 3892; 1 Smith & Ben. Rev. Stat. Ohio, 1890, sec. 3645; Bright. Pur. Dig. Pa., 12th ed., 1700-1894, vol. 1, p. 1046, sec. 63; Hill's Annot. Code, Wash., 1891, sec. 2739; Rev. Stat. Wyo., 1887, p. 223, sec. 614.

<sup>188</sup> See secs. 43, 176, 177, herein.

<sup>189</sup> See *Higginson v. Dall*, 13 Mass. 96, per Parker, C. J.; *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664.

<sup>190</sup> *Higginson v. Dall*, 13 Mass. 96, per Parker, C. J.; *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664.

<sup>191</sup> *Keim v. Home Mut. Ins. Co.*, 42 Mo. 38; 97 Am. Dec. 291; *Cheriot v. Barker*, 2 Johns. (N. Y.) 346; 3 Am. Dec. 437; *Waxahachie Bank v. Lancashire Ins. Co.*, 62 Tex. 461; *Weston v. Emes*, 1 Taunt. 115; *Vandervoort v. Smith*, 2 Caines (N. Y.), 155; 1 Marshall on Insurance, ed. 1810, 345a; *Stacey v. Franklin F. Ins. Co.*, 2 Watts & S. (Pa.) 506; *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317; 26 N. Y. S. 780; 22 N. E. Rep. 443. See sec. 160, herein.

## CHAPTER VII.

### CONSTRUCTION—WHAT IS PART OF THE POLICY.

- § 185. What is part of the policy: General rule: Parol evidence.
- § 186. When application is part of the policy.
- § 187. When application is not part of the policy.
- § 188. When charter and by-laws are and are not part of contract.
- § 189. Effect of subsequent amendment of by-laws or enactment of new by-laws.
- § 190. Application and by-laws, when part of contract: Statutory provisions.
- § 191. When other papers are and are not part of policy.
- § 192. Whether prospectus or pamphlet part of policy.
- § 193. Same subject: The cases.
- § 194. Whether common and statutory law part of contract.
- § 195. Indorsements: Marginal references—When part of policy—When not.
- § 196. Conditions annexed to policy—When and where not part of same.
- § 197. Whether premium note part of policy.
- § 198. Usage—How far part of policy.

§ 185. **What is Part of the Policy—General Rule—Parol Evidence.**—Whatever is intended to be made a part of the policy should be either inserted therein or be incorporated by proper words of reference, and whether the correspondence or application, or other papers or indorsements on the policy, are a part thereof, are questions that have frequently been before the courts. If parol evidence were admissible to vary a written contract of insurance, then all prior negotiations, correspondence, proposals, and other acts would become as much a part of the contract as though actually embodied in the policy, and it could never be known exactly what the terms of the contract were, except, perhaps, after extended litigation, and the safeguard which a policy ought to afford would be valueless if its terms could thus be added to or limited. It is, therefore, a general rule that all prior negotiations are considered as

waived or merged in the written contract, and that in the absence of fraud, duress, or mistake, parol evidence is inadmissible to contradict or vary its terms. The entire engagement of the parties, with all the conditions upon which its fulfillment can be claimed, must be conclusively presumed to have been stated in the policy, as the terms of the policy when explicit must control.<sup>1</sup> So it cannot be shown that only a particular interest, as that of a warehouseman, was intended where the contract is unambiguous;<sup>2</sup> nor can the intention of the parties be explained by parol evidence, although part of the policy is written and part printed, where there is no contradiction between the two parts and there is no ambiguity.<sup>3</sup> Nor is parol evidence admissible to show that the insured did not agree to the conditions;<sup>4</sup> for whatever proposals or negotiations are made or conversations had are to be considered as waived or merged in the written contract.<sup>5</sup> In case the vessel insured be warranted as neutral, it cannot be shown by parol evidence that such warranty was not intended,<sup>6</sup> nor can the intention be shown by parol evidence in contradiction of the terms of the policy,<sup>7</sup> nor is the memorandum admissible to change the intent evidenced by the policy.<sup>8</sup> But the order for insurance

<sup>1</sup> *Candee v. Citizens' Ins. Co.*, 4 Fed. Rep. 143; *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362; *Finney v. Bedford Commercial Ins. Co.*, 8 Met. (Mass.) 348; 41 Am. Dec. 515; *Bell v. Western etc. Ins. Co.*, 5 Rob. (La.) 423; 39 Am. Dec. 542; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568; 11 Vroom (N. J.), 568; 29 Am. Rep. 271; *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill. 516; 5 Am. Rep. 64; *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 609; *Sanborn v. Fireman's Ins. Co.*, 16 Gray (Mass.), 448; 77 Am. Dec. 419; *Mutual B. L. Ins. Co. v. Reise*, 8 Ga. 536; *Creston v. Emes*, 1 Taunt. 115.

<sup>2</sup> *Lancaster Mills v. Merchants' etc. Co.*, 89 Tenn. 1; 24 Am. St. Rep. 586; 14 S. W. Rep. 317.

<sup>3</sup> *Mumford v. Hallett*, 1 Johns. 433.

<sup>4</sup> *Liverpool etc. Co. v. Morris*, 79 Ga. 666; 5 S. E. Rep. 125.

<sup>5</sup> See opinion of Chief Justice Parker in *Higginson v. Dall*, 13 Mass. 96, 98, cited in *Dewees v. Manhattan Ins. Co.*, 35 N. J. L. 366, 372; *Merchants' Mut. Ins. Co. v. Lyman*, 15 Wall. (U. S.) 664.

<sup>6</sup> *Lewis v. Thatcher*, 15 Mass. 431.

<sup>7</sup> *Hough v. People's F. Ins. Co.*, 36 Md. 398.

<sup>8</sup> *Ewer v. Washington Ins. Co.*, 16 Pick. (Mass.) 502; 28 Am. Dec. 258; *Hogan v. Delaware Ins. Co.*, 1 Wash. C. C. 419; *Higginson v. Dall*, 13 Mass. 96.

may be adopted as a part of the policy, and is to be resorted to when construing it;<sup>9</sup> nor can a condition as to the time and place of payment of the premiums be varied by such evidence;<sup>10</sup> nor is it permitted to show that prior to issuing the policy an agreement was made and not inserted therein that upon the happening of a certain event the policy should become void;<sup>11</sup> nor that before the contract was executed the parties agreed to insure "outfits" under the term "advances";<sup>12</sup> nor can a contemporaneous agreement to waive a provision affecting the risk in the policy be shown by parol;<sup>13</sup> nor can it be shown after a loss that the application was for a policy materially different from the one issued;<sup>14</sup> nor in an action on a fire policy which clearly states the property insured is parol evidence admissible to show a mistake, and that it was the intention to insure other property.<sup>15</sup> So parol evidence cannot be received to control a warranty in a policy of insurance, and accordingly evidence to prove that the insurer was informed that a watchman was not kept in the building insured from twelve o'clock Saturday night till twelve o'clock Sunday night, there being a warranty for a watchman every night, should be rejected;<sup>16</sup> nor can a written contract of insurance be altered or varied by parol evidence of what occurred between the insured and the agent of the insurer at the time of effecting the insurance. Such evidence will not be received to raise up an estoppel in pais which shall conclude the insurer from setting up the defense that the policy was forfeited by a breach of the conditions of insurance.<sup>17</sup> Although the better rule is that parol evidence is admissible of the agent's misrepresentations or mistakes in filling out the application where he has knowledge or has been correctly in-

<sup>9</sup> *Maryland v. Bossiere*, 9 Gill. & J. (Md.) 121.

<sup>10</sup> *Mobile L. Ins. Co. v. Pruett*, 74 Ala. 487.

<sup>11</sup> *Candee v. Citizens' Ins. Co.*, 4 Fed. Rep. 143.

<sup>12</sup> *Burnham v. Boston M. Ins. Co.*, 139 Mass. 390.

<sup>13</sup> *Lamott v. Hudson River Ins. Co.*, 17 N. Y. 199.

<sup>14</sup> *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114.

<sup>15</sup> *Holmes v. Charlestown etc. Co.*, 10 Met. (Mass.) 211; 43 Am. Dec. 428.

<sup>16</sup> *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362.

<sup>17</sup> *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568; 11 Vroom (N. J. L.), 568; 29 Am. Rep. 271.

formed as to the facts;<sup>18</sup> but a policy cannot be changed or altered by parol evidence where the party is named and his interest specified, except fraud or mistake be alleged. The intent as shown by the instrument itself must be sought, since the same principles of construction obtain in this regard as in other written contracts.<sup>19</sup> But in case of fraud or mistake, as where the terms of an order to insure have been materially departed from in the policy by fraud or mistake, the order will be considered as containing the contract between the parties, although it can only be resorted to in so far as it varies from the policy. In all other respects the policy should be considered as the contract.<sup>20</sup> Where a party made an application in writing, signed by him, for insurance upon certain property, gave his note payable to the insurance company to the agent of the company for the premium, and took from the agent a receipt showing the giving of the note, and stating that, in case the policy should not be issued, the note was to be returned, it was decided that these papers must be regarded as the contract of the parties, and could not be varied or explained by parol evidence.<sup>21</sup> In another case it appeared that the agent of the company omitted to insert in a policy on general merchandise permission to the assured to keep kerosene oil and powder in the same building with such stock, which permission was in accordance with the actual contract. It was held that parol evidence was admissible to show knowledge by the agent that such goods were to be kept.<sup>22</sup> If the terms of the policy are not clear and unambiguous, parol evidence not inconsistent therewith may be resorted to to explain the same; as in case of a clause, "loss, if any, payable to G. and B. of N.,"<sup>23</sup> and parol evidence of the contents of an order verbally communicated by the broker to the insurer is admissible, as this is not evidence of the contents of a writing.<sup>24</sup> So where an insurance

<sup>18</sup> See chapter on Agents, herein.

<sup>19</sup> *Reil v. Western etc. Ins. Co.*, 5 Rob. (La.) 423; 39 Am. Dec. 542.

<sup>20</sup> *Delaware Ins. Co. v. Hogan*, 2 Wash. (C. C.) 4.

<sup>21</sup> *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; 5 Am. Rep. 64.

<sup>22</sup> *Mobile F. Dept. Ins. Co. v. Miller*, 58 Ga. 420.

<sup>23</sup> *Graham v. Fireman's Ins. Co.*, 2 Disn. (Ohio) 255.

<sup>24</sup> *Livingston v. Delafield*, 1 Johns. (N. Y.) 522.

was on goods in the D. & Co.'s car factory it may be shown by parol what building was meant.<sup>25</sup>

§ 186. **When Application is Part of the Policy.**—The question whether the application is part of the contract or not is of great importance in construing policies and determining the force and effect of the statements in such application. There is a great want of unanimity in the cases, but it may be stated as a general rule that a clear purpose, unequivocally expressed, manifest from the papers, to make an application a part of the contract will have that effect, and make them one entire contract. But where the reference to the application is expressed to be for another purpose, or where it is not clearly expressed that it is intended to make the application a part of the contract, the courts are not inclined to make it so by construction. This rule accords with the rules of construction regarding the intent of the parties, and that warranties and forfeitures are not favored, as well as with such rules in other respects.<sup>26</sup> So if the policy expressly refers to the application as a part thereof, all the stipulations and conditions in the application are thereby engrafted into it, and made as much a part of the policy as if written in terms therein, and are to be construed together with it.<sup>27</sup> And it is said that the application is in itself collateral merely to the contract of insurance, and to make it a part of the policy there must be an obvious intent so to do;<sup>28</sup> and also that the language making the appli-

<sup>25</sup> *Blake v. Exchange etc. Ins. Co.*, 12 Gray (Mass.), 265.

<sup>26</sup> See *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 380, 391, per the court; *Daniels v. Hudson River Ins. Co.*, 12 Cush. (Mass.) 423; 59 Am. Dec. 192.

<sup>27</sup> *Holmes v. Charlestown Mut. F. Ins. Co.*, 10 Met. (Mass.) 211; 43 Am. Dec. 428; *Burritt v. Saratoga etc. Ins. Co.*, 5 Hill (N. Y.), 188; 40 Am. Dec. 345; *Jennings v. Chinango Mut. Ins. Co.*, 2 Denio (N. Y.), 75; *Eban v. Mutual Ins. Co. of Albany*, 5 Denio (N. Y.), 326; *Shoemaker v. Glen Falls Ins. Co.*, 60 Barb. (N. Y.) 84; *Clark v. Manufacturers' Ins. Co.*, 8 How. (U. S.) 235; *Chrisman v. State Ins. Co.*, 16 Or. 283; 18 Pac. Rep. 466; *Worsley v. Wood*, 6 Durn. & E. 710. See *Key Louisville Mut. Ins. Co. v. Southard*, 8 B. Mon. 634.

<sup>28</sup> *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 389, 391, per the court; *Holmes v. Charlestown etc. Ins. Co.*, 10 Met. (Mass.) 211; 43 Am. Dec. 428.

cation a part of the policy must unequivocally appear on the face of the policy.<sup>29</sup> So the words "reference being had to the application . . . for a more particular description, and as forming a part of this policy," are held a sufficient reference.<sup>30</sup> And where there was a provision in a policy that "in consideration of the statement of facts warranted to be true in the application for this policy, and of the payment" of certain specified sums, the company assumed the risk, it was held that the application was thus made a part of the contract.<sup>31</sup> It is also held that where a policy is made and issued upon a survey and description of certain property, the survey being referred to by number as filed in the office of the company, such survey is a basis of the contract and part of the policy.<sup>32</sup> So where the reference is to the application filed in the office of the company,<sup>33</sup> and where an application and survey is made to accompany a policy or is referred to therein as a part thereof, they should be construed together with the policy as one entire contract.<sup>34</sup> So the proposals and conditions attached to the policy form a part of it, and are of the same force as if embodied in the policy;<sup>35</sup> but it is also held that the application need not be expressly referred to in the policy as a part thereof.<sup>36</sup> So a declaration in an application constitutes a portion of the policy where the latter provides that it shall be void if the declaration "upon the faith of which this agreement was made" is untrue;<sup>37</sup> and it is held that the application is a part of the policy where the latter recites that "the basis of this contract is the application of the insured";<sup>38</sup> and where the "applica-

<sup>29</sup> *Hartford etc. Ins. Co. v. Harmer*, 2 Ohio St. 452; 59 Am. Dec. 684; *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y.), 632.

<sup>30</sup> *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Barb. (N. Y.) 285.

<sup>31</sup> *Standard etc. Assn. v. Martin*, 133 Ind. 376; 33 N. E. Rep. 105.

<sup>32</sup> *Stewart v. Phoenix Ins. Co.*, 5 Hun (N. Y.), 261.

<sup>33</sup> *Draper v. Charter Oak etc. Ins. Co.*, 2 Allen (Mass.), 569.

<sup>34</sup> *Clinton v. Hope Ins. Co.*, 51 Barb. (N. Y.) 647.

<sup>35</sup> *Duncan v. Sun F. Ins. Co.*, 6 Wend. (N. Y.) 488; 22 Am. Dec. 539; *Devees v. Manhattan Ins. Co.*, 34 N. J. L. 244.

<sup>36</sup> *Murdock v. Chenango Mut. Ins. Co.*, 2 N. Y. 210.

<sup>37</sup> *Day v. Mutual B. L. Ins. Co.*, 1 McAr. (D. C.) 41; 29 Am. Rep. 565.

<sup>38</sup> *Babbitt v. Liverpool etc. Ins. Co.*, 66 N. C. 70; 8 Am. Rep. 494.

tion is made and accepted subject to all other clauses and conditions in the policies of the company," it is part of the policy;<sup>39</sup> and this is so where the policy is issued and accepted in consideration of the agreements made in the application.<sup>40</sup> It is held that the application for membership in a mutual benefit society constitutes a part of the contract even without regard to the fact whether there is any constitutional requirement of such character.<sup>41</sup>

**§ 187. Where Application is not Part of Policy.—**

When the reference to the application is expressed to be for another purpose, or when no purpose or intention is indicated to make it a part of the policy, it will not be so treated.<sup>42</sup> So it is held that a mere general reference to the application or survey does not make it a part of the contract.<sup>43</sup> It is also held that the application is not a part of the contract so as to require setting forth in pleading, though the policy provides that if it is issued upon or refers to "an application, survey, plan, or description," it should be made a part of the contract, and this although the policy was issued on such application signed by the insured;<sup>44</sup> and a reference to and making an ap-

<sup>39</sup> *Weinberger v. Merchants' M. Ins. Co.*, 41 La. Ann. 31; 5 S. Rep. 728.

<sup>40</sup> *Mandego v. Centennial Mut. L. Assn.*, 64 Iowa, 134. What is part of policy, see *Philbrook v. New England Mut. F. Ins. Co.*, 37 Me. 137; *Studwell v. Mutual B. L. Assn. of America*, 19 N. Y. St. Supp. 709; *Cuthbertson v. North Carolina H. Ins. Co.*, 96 N. C. 480; 2 S. E. Rep. 258; *Foot v. Life Ins. Co.*, 61 N. Y. 575; *Supreme Council etc. v. Curd*, 111 Ill. 284; *Jeffries v. Life Ins. Co.*, 22 Wall. (U. S.) 47. See, also, *Mace v. Provident L. Assn.*, 101 N. C. 122. Where policy refers to application as part, and it is defective or even not made in writing, see *Blake v. Exchange etc. Ins. Co.*, 12 Gray (Mass.), 265. See further on this point chapter on Representations and Warranties, post, herein.

<sup>41</sup> *Grand Lodge etc. v. Jesse*, 50 Ill. App. 101.

<sup>42</sup> *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 389, 392, per the court; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; 22 Am. Dec. 567.

<sup>43</sup> *Wheelton v. Hardisty*, 8 El. & B. 285, 295; *Burritt v. Saratoga etc. Ins. Co.*, 5 Hill (N. Y.), 188; 40 Am. Dec. 345; *Weed v. Schenectady Ins. Co.*, 7 Lans. (N. Y.) 452.

<sup>44</sup> *Throop v. North American etc. Ins. Co.*, 19 Mich. 423, one judge dissenting upon the authority of numerous cases.



plication a part of the contract does not bind the applicant where the application is not signed, authorized, or ratified by him.<sup>45</sup> It is also held that the agreements and statements in the application do not become a part of the policy, although it is provided in the application that they should "be the basis and form part of the contract or policy," and although the policy provided that the contract was "in consideration of the representations."<sup>46</sup> Nor does an indication in the policy of the place where the application is on file make it a part of the policy,<sup>47</sup> and a condition in the application does not make it a part of the policy where the policy does not refer to it,<sup>48</sup> and it is held that a slip or application is inadmissible to show the intention of the parties, since the policy is the only legal evidence of the contract.<sup>49</sup> Where a fire policy had expired and the application therefor was used in obtaining insurance in another company, the policy in which contained the words "as per application No. 1234," which was the number of the original application, it was determined not to be a sufficient reference to make it a part of the policy.<sup>50</sup> And in another case the court excluded the application as evidence in an action on a time policy of marine insurance, on the ground that the application was merged in the policy.<sup>51</sup> And where the policy refers only to the application as the consideration in part for the insurance, the legal construction of the policy cannot be controlled by a statement in the application of the understanding of the assured and what the insurance will "extend to."<sup>52</sup>

**§ 188. When Charter and By-laws are and are not Part of Contract.**—When a party complies with the requirements of a mutual benefit or like society or corporation, and be-

<sup>45</sup> *Lycoming F. Ins. Co. v. Jackson*, 83 Ill. 302; 25 Am. Rep. 386.

<sup>46</sup> *American etc. Ins. Co. v. Day*, 39 N. J. L. 89; 23 Am. Rep. 198.

<sup>47</sup> *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352.

<sup>48</sup> *Brogan v. Manufacturers' etc. Ins. Co.*, 29 U. C. C. P. 414.

<sup>49</sup> *Dow v. Whelton*, 8 Wend. (N. Y.) 160.

<sup>50</sup> *Vilas v. New York Cent. Ins. Co.*, 72 N. Y. 590; 28 Am. Rep. 186.

<sup>51</sup> *Folsom v. Mercantile Ins. Co.*, 9 Blatchf. (C. C.) 201.

<sup>52</sup> *Accident Ins. Co. v. Crandal*, 120 U. S. 527; 7 S. Ct. Rep. 685. See *Hunter v. Scott*, 108 N. C. 213; 12 S. E. Rep. 1027. See further on this point chapter on Representations and Warranties herein.

comes a member, its charter and by-laws are presumed to have been known by him from the date of his membership, and they enter into and form a part of his contract even though, in the absence of a statutory requirement to the contrary, they are not set forth in his policy nor expressly made a part of it by reference.<sup>53</sup> And all the provisions of the by-laws not inconsistent with the terms of the policy,<sup>54</sup> and which are within the scope of the purposes and nature of the organization, will be held binding.<sup>55</sup> So the constitution and by-laws are binding on a charter member and form part of the contract where his attention has been directed to them,<sup>56</sup> and where the policy declares that the insurance is made with reference to its conditions and the terms of its constitution and by-laws, the fact that each of the conditions annexed to the policy refers to a by-law cannot warrant the assumption on the part of the insured that the by-laws contain no other conditions,<sup>57</sup> but a by-law prohibiting insurance for over two-thirds the estimated value of the property is not a part of the contract, but is merely directory;<sup>58</sup> and

<sup>53</sup> *Pfister v. Gerwig*, 122 Ind. 567; 23 N. E. Rep. 1041; *Susquehanna Mut. F. Ins. Co. v. Leavy*, 136 Pa. St. 499; 20 Atl. Rep. 502, 505; *Fry v. Charter Oak Ins. Co.*, 31 Fed. Rep. 197; *Hyatt v. Wait*, 37 Barb. (N. Y.) 29; *Davidson v. Old People's Mut. B. Soc.*, 39 Minn. 303, 304; 1 Law Rep. Ann. 482; *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122; *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.), 174; *Boyle v. North Carolina etc. Ins. Co.*, 7 Jones (N. C.), 373; *Maginnis' Estate v. New Orleans etc. Assn.*, 43 La. Ann. 1186; 10 S. Rep. 180; *Wendt v. Iowa L. of H.*, 72 Iowa, 682; 34 N. W. Rep. 470; *Simeral v. Dubuque etc. Ins. Co.*, 18 Iowa, 319; *Burbank v. Rockingham Ins. Co.*, 24 N. H. 550, 558; 57 Am. Dec. 300; *Gray v. Supreme Lodge etc.*, 118 Ind. 293; 20 N. E. Rep. 833; *Treadway v. Hamilton Mut. Ins. Co.* 29 Conn. 68; *Great Britain S. S. Assn. v. Wyllie*, L. R. 22 Q. B. D. 710; *Protection L. Ins. Co. v. Foote*, 79 Ill. 361. "Undoubtedly, when the plaintiff complied with what was required of him as a member, the by-laws constituted a contract": *Stohr v. San Francisco etc. Soc.*, 82 Cal. 557, 559; 22 Pac. Rep. 1125.

<sup>54</sup> *Davidson v. Old People's Mut. B. Soc.*, 39 Minn. 303; 1 Law Rep. Ann. 482, and see cases in last note.

<sup>55</sup> *Mutual Assur. Soc. v. Korn*, 7 Cranch (U. S.), 396.

<sup>56</sup> *Sabin v. Senate of Nat. Union*, 90 Mich. 177; 51 N. W. Rep. 202; *Sargent v. Supreme Lodge K. of H.*, 158 Mass. 537; 33 N. E. Rep. 650; 22 Ins. L. J. 545.

<sup>57</sup> *Miller v. Hittsborough Mut. F. Assur. Assn.*, 42 N. J. Eq. 459, 462; 7 Atl. Rep. 896.

<sup>58</sup> *Cumberland Valley Mut. Prot. Co. v. Schell*, 29 Pa. St. 31.

the charter of a foreign insurance company must be brought to the notice of a party to bind him as to conditions therein.<sup>59</sup> Where the charter and by-laws are a part of the contract between the member and the society, the latter is also bound thereby, and where the by-laws provide for mortuary benefits, the fact that the certificate does not provide for such benefits will not relieve the society from its liability.<sup>60</sup>

**§ 189. Effect of Subsequent Amendment of By-laws or Enactment of New By-laws**—The question has arisen not infrequently in our courts as to whether the amendment of the by-laws or subsequent enactment of new laws or modifications of existing ones affects the contract so as to enter into the terms of it and become a part of it, or not. We believe, however, that such amendments or new laws cannot operate retroactively or infringe upon or divest the insured of rights which are already determined or ascertained by his contract. But the assured may, however, under the terms of his contract or by agreement or ratification, be bound by such subsequent amendments, modifications, or new laws.<sup>61</sup> It is held, however, that it is incident to the very nature and purpose of beneficial and like insurance associations that they should have power to modify and change their by-laws so as to graduate claims upon them under their contracts in such manner as experience and necessity may require. They may regulate the manner in which they shall most reasonably carry out the purposes for which they are associated, although they cannot pervert the objects of their organization. It is also held that a society may limit the amount of recovery for sick benefits by a subsequently enacted by-law, in view of the above principles, and that such a by-law does not impair vested rights. The court, however, in this particular case modified the statements by the fact that when the certificate was taken out there was exist-

<sup>59</sup> City Fire Ins. Co. v. Carrugi, 41 Ga. 660.

<sup>60</sup> Railway Pass. etc. Assn. v. Robinson, 147 Ill. 138; 35 N. E. Rep. 168; 23 Ins. L. J. 79.

<sup>61</sup> See Supreme Com. etc. v. Alnsworth, 71 Ala. 449; 46 Am. Rep. 332; Poultney v. Bachman, 62 How. Pr. (N. Y.) 466; Bacon on Benefit Societies and Life Insurance, ed. 1888, secs. 185-88.

ing a special provision for altering or changing the by-laws.<sup>62</sup> But it is decided that the fact that amendments were made to the articles of incorporation did not estop the insured from denying that they were part of the contract where they were not made known to him at the time of taking out the policy.<sup>63</sup> It is also held that a new article of incorporation adopted subsequently to the issue of a certificate does not make it a part of the contract so as to destroy a right which the insured previously had under his policy;<sup>64</sup> but it is otherwise where the insured agrees to be governed by changes which may afterward be made, and receives a copy of the new by-law, and does not object thereto and continues his membership,<sup>65</sup> or where the general law of the state and the by-laws gives power to repeal, alter, or amend by-laws, both the statute and by-laws become part of the contract, and the amendment of the by-laws is not a breach of contract.<sup>66</sup> So where a certificate in a mutual benefit society is to be paid "in an amount to be computed according to the laws" of the society, and such laws provide that the provisions therein relative to the payment of such certificates may be changed at any time, a member who has procured such a certificate will be bound by any change which is made therein between the time of procuring the certificate and the time of its payment.<sup>67</sup>

**§ 190. Application and By-laws When part of Contract—Statutory Provisions.**—In many of the states there are statutory provisions requiring the annexation of the application to the policy, or that copies of the application and by-laws shall be contained in or attached to the policies.<sup>68</sup> It is

<sup>62</sup> *Fugure v. Soc. of St. Joseph*, 46 Vt. 369.

<sup>63</sup> *Day v. Mill Owners' F. Ins. Co.*, 75 Iowa, 694; 38 N. W. Rep. 113.

<sup>64</sup> *Hobbs v. Iowa Mut. B. Assn.*, 82 Iowa, 107; 47 N. W. Rep. 983; 11 Law Rep. Ann. 299; 20 Ins. L. J. 434. See, also, *Stewart v. Mutual F. Ins. Assn.*, 64 Miss. 499.

<sup>65</sup> *Bogards v. Farmers' Mut. Ins. Co.*, 79 Mich. 440; 44 N. W. Rep. 856.

<sup>66</sup> *Stohr v. San Francisco M. F. Soc.*, 82 Cal. 557; 22 Pac. Rep. 1125; *Sargent v. Supreme Lodge etc.*, 153 Mass. 557; 33 N. E. Rep. 650; 22 Ins. L. J. 545.

<sup>67</sup> *Cowie v. Grand Lodge etc.*, 99 Cal. 392; 34 Pac. Rep. 103.

<sup>68</sup> Application shall be annexed: California, *Deering's Civ. Code*, Joyce, Vol. I.—17

held in Pennsylvania that the intent of the statute, making applications for insurance and by-laws of companies inadmissible in evidence unless a copy thereof is attached to the policy, was to produce a uniform rule of procedure and to apply to all insurance companies incorporated by the laws of the state, as well as to all other corporations insuring within the state.<sup>69</sup> A statement written at the end of a policy entitled "copy of application," not containing any signature, is not a part of the policy, nor are any of its recitals binding on the insured.<sup>70</sup> So an act requiring that the application be annexed to or copied into the policy has been held constitutional. Such act does not impair the obligation of contracts,<sup>71</sup> and under such act an affidavit of defense is defective if it fails to allege that the application was so annexed;<sup>72</sup> nor is such act superseded by an act regulating mutual benefit societies,<sup>73</sup> and a demurrer will lie to a plea of misrepresentations when such act has not been complied with.<sup>74</sup> A statement unsigned, although annexed and entitled "copy of application," is not admissible in evidence,<sup>75</sup> and the application is not admissible where not attached.<sup>76</sup> Nor are the by-laws a

sec. 2605; Iowa, McClain's Stat. 1888, sec. 1733; Kansas, Gen. Stat. 1889, vol. 1, sec. 3437; Massachusetts Act, 1890, c. 421, sec. 21; Ohio, Glauque's Rev. Stat. 1890, 6th ed., sec. 3623; Oklahoma, Stat. 1890, sec. 3155; Pennsylvania, 1 Bright. Purd. Dig., 12th ed., p. 1046, sec. 62; Wisconsin, 1 Sanb. & Berr. Ann. Stat. 1889, sec. 1945 a. Application and by-laws to be contained in or attached to life or fire policy: Connecticut, Gen. Stat. 1888, sec. 2828; Maine, Rev. Stat. 1883, c. 49, sec. 24; Massachusetts, Acts 1887, c. 214, sec. 59.

<sup>69</sup> Kittaning Ins. Co. v. Hebb, 138 Pa. St. 174; 21 Pitts. L. J., N. S., 153; 27 Week. Not. Cas. 97; 43 Phila. Leg. Ins. 35; 20 Ins. L. J. 92; 20 Atl. Rep. 837.

<sup>70</sup> Under act Pa. May 11, 1881; Susquehanna Mut. F. Ins. Co. v. Hallock (Pa.), 14 Atl. Rep. 167; Dunbar v. Phoenix Ins. Co., 72 Wis. 492; 40 N. W. Rep. 386.

<sup>71</sup> New Era etc. Co. v. Musser, 120 Pa. St. 384; 14 Atl. Rep. 155; 12 Cent. Rep. 477.

<sup>72</sup> Metropolitan etc. Co. v. Jenkins (Pa. 1886), 10 Atl. Rep. 474. Not reported in state reports.

<sup>73</sup> McConnell v. Iowa Mut. A. Assn., 79 Iowa, 757, 760; 43 N. W. Rep. 188.

<sup>74</sup> Cook v. Federal L. Assn., 74 Iowa, 746; 35 N. W. Rep. 500.

<sup>75</sup> Susquehanna Mut. Ins. Co. v. Hallock (Pa.), 14 Atl. Rep. 167; 12 Cent. Rep. 478.

<sup>76</sup> Pickett v. Pacific Mutual L. Ins. Co., 144 Pa. St. 79; 22 Atl. Rep.

part of the contract, though attached to the policy, when unsigned by the company's officers as provided by statute.<sup>77</sup> It is held in England that a deed-poll containing an insurance against fire may refer to conditions in the printed proposals without stamp, seal, or signature.<sup>78</sup> The omission to indorse or attach the application does not, however,<sup>79</sup> invalidate the policy, but only goes to the pleading and proof of the representations,<sup>80</sup> and the application, if not attached, is properly excluded in evidence, though the policy provides that it is to be a part thereof.<sup>81</sup> But it is held in a recent Pennsylvania case that the by-laws may be put in evidence by the insurer, notwithstanding they are not attached to the policy as required by statute, since the statute does not apply to orders doing business through lodges.<sup>82</sup>

**§ 191. When Other Papers are and are not Part of Policy.**—Other papers may become a part of the policy by being annexed thereto or subjoined, or by being referred to therein in plain terms as a part thereof,<sup>83</sup> but the intent to incorporate such other papers should be plainly manifest and not dependent upon implication.<sup>84</sup> So a mortgage slip making the loss payable to the mortgagee may be at-

871; 13 Law Rep. Ann. 661; *Mahon v. Pacific Mut. L. Ins. Co.*, 144 Pa. St. 409; 22 Atl. Rep. 876.

<sup>77</sup> *Capitol Ins. Co. v. Pleasanton*, 48 Kan. 397; 29 Pac. Rep. 578; *Capitol Ins. Co. v. Bank of Blue Mound*, 48 Kan. 393; 29 Pac. Rep. 576.

<sup>78</sup> *Rutledge v. Burrell*, 1 H. Black. 255.

<sup>79</sup> Under Iowa Act, Miller's Code, 1888, p. 398.

<sup>80</sup> *McConnell v. Iowa Mut. A. Assn.*, 79 Iowa, 757; 43 N. W. Rep. 188.

<sup>81</sup> *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460; 2 Am. St. Rep. 686; 12 Atl. Rep. 668, under act May 11, 1881.

<sup>82</sup> *Donlevy v. Supreme Lodge etc.*, 11 Pa. Co. Ct. 477; 49 Leg. Intell. 145.

<sup>83</sup> See *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 303; 14 Vroom, 300; 39 Am. Rep. 584; *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235; 58 Am. Dec. 420.

<sup>84</sup> *Weed v. Schenectady Ins. Co.*, 7 Lans. (N. Y.) 452; *Burritt v. Saratoga Co. Mut. F. Ins. Co.*, 5 Hill (N. Y.), 188; 40 Am. Dec. 345, per *Bronson, J.*; *Moore v. State Ins. Co.*, 72 Iowa, 414; 34 N. W. Rep. 183; *Merchants' Ins. Co. v. Dwyer*, 1 Tex. Unrep. Cas. 445.

tached to the policy and become a part of the contract.<sup>85</sup> And a rider attached to a marine policy subsequent to its issuance giving permission to navigate in other waters than allowed by the terms of the policy becomes a part of the contract,<sup>86</sup> and a paper written in lead pencil and signed by the insured may be a part of the policy when it is referred to therein by number.<sup>87</sup> A separate paper may by distinct and clear reference be expressly made a part of the contract, but a simple reference is not sufficient,<sup>88</sup> and the whole of a survey may be incorporated by proper reference.<sup>89</sup> So a receipt for the husband's notes given in payment of a premium for a policy insuring his wife's interest in his life, is a part of the contract.<sup>90</sup> So an ad interim receipt may be a part.<sup>91</sup> Again, a separate paper may by express stipulation be made part of a policy, but where from the manner of referring to it it would seem that the insurers were satisfied to look to it only for the purpose of estimating the risk, it is not a part of the policy.<sup>92</sup> In *Bize v. Fletcher*,<sup>93</sup> it appeared that at the time the insurers underwrote the policy a slip of paper was wafered to it describing the state of the ship as to repairs and strength, and it also mentioned several particulars as to her intended voyage, and Lord Mansfield held that this was not a part of the policy so as to make the statements other than representations. It was said of this in a New York case<sup>94</sup> that it would be impossible to sustain the decision if the slip so wafered had expressly declared itself to be conditions. In this last case the policy was printed on one-half the sheet and the "conditions of insurance" on the other, and it was held

<sup>85</sup> *Westchester F. Ins. Co. v. Coverdale*, 48 Kan. 446; 29 Pac. Rep. 682; 21 Ins. L. J. 530.

<sup>86</sup> *Mark v. Home Ins. Co.*, 52 Fed. Rep. 170.

<sup>87</sup> *City Ins. Co. v. Bircher*, 91 Pa. St. 488.

<sup>88</sup> *Hartford etc. Ins. Co. v. Harmer*, 2 Ohio St. 452; 59 Am. Dec. 684. See *Anderson v. Fitzgerald*, 4 H. L. Cas. 474.

<sup>89</sup> *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 235; 58 Am. Dec. 420.

<sup>90</sup> *Baker v. Union L. Ins. Co.*, 6 Abb. Pr., N. S. (N. Y.), 144; 37 How. Pr. (N. Y.) 126.

<sup>91</sup> *Goodwin v. Insurance Co.*, 16 L. O. Jur. 298.

<sup>92</sup> *Snyder v. Farmers' Ins. and Loan Co.*, 13 Wend. (N. Y.) 92.

<sup>93</sup> 1 Doug. 284, 291; 13, n. 4.

<sup>94</sup> *Roberts v. Chenango Co. Mut. Ins. Co.*, 3 Hill (N. Y.), 501, 503.

that the conditions were part of the policy, and that there was no need of an express reference thereto in the policy; that the juxtaposition of the papers was *prima facie* evidence of the parties' intention, which might be rebutted, however, by parol evidence, as by showing that the two were thus connected by mistake.<sup>95</sup> Again, it is held that a paper detached from the policy containing instructions relative to the force with which the ship was to sail, and which was shown to the underwriter at the time of subscribing, did not thereby become a part thereof,<sup>96</sup> and a diagram on the back of an application which is not itself properly made a part, there being no evidence that the insured ever saw or knew of the diagram, it having been made by the agent,<sup>97</sup> and a letter written after the application was rejected in regard to insurable interest, and held not to be a part of the policy thereafter issued, nor of the application,<sup>98</sup> nor are proofs of loss a part.<sup>99</sup>

**§ 192. Whether Prospectus or Pamphlet Part of Policy.**—Whether a prospectus or pamphlet is a part of the policy is a question in which there is a conflict between the cases wherein this issue has been distinctly before the courts. It would seem that in many English decisions, where there has been an equitable replication,<sup>100</sup> the courts have been inclined to hold that the prospectus or pamphlet is a part of the contract, especially if it appears that the representations therein were an inducement to the assured to enter into the contract.<sup>101</sup> The rule in this country is not settled. If the prospectus or

<sup>95</sup> Same point in *Murdock v. Chenango Co. Mut. Ins. Co.*, 2 N. Y. 210, 220. See, also, *Duncan v. Sun F. Ins. Co.*, 6 Wend. (N. Y.) 488; 22 Am. Dec. 539.

<sup>96</sup> *Pawson v. Watson*, Cowp. 785.

<sup>97</sup> *Vilas v. New York C. Ins. Co.*, 72 N. Y. 590; 28 Am. Rep. 188.

<sup>98</sup> *Mace v. Providence L. Ins. Assn.*, 101 N. C. 122; 7 S. E. Rep. 647. See *Menk v. Home Ins. Co.*, 76 Cal. 51; 9 Am. St. Rep. 158; *Alemannia F. Ins. Co. v. Peck*, 133 Ill. 220; 23 Am. St. Rep. 610.

<sup>99</sup> *McMaster v. Insurance Co.*, 55 N. Y. 222; 14 Am. Rep. 239.

<sup>100</sup> Under the Common Law Procedure Act, 1854, 17 & 18 Vict., c. 125, secs. 83-86.

<sup>101</sup> See *Wood v. Dwarria*, 11 Exch. (Hurl. & G.) 493; *Salvin v. James*, 6 East, 571.



pamphlet is expressly, by reference or otherwise, made a part of the policy, then such should be the effect, but in case it is not so made a part of the policy, then the question is not so easily determined. If the question were to be decided upon equitable principles, then such prospectus or pamphlet, where the representations therein were made a special inducement to the assured to enter into the contract, and were relied upon by him, might be considered a part of the policy on the ground of estoppel, or perhaps, if on no other, of mistake, in that the policy did not contain all the terms of the agreement. But we believe that inasmuch as it is within the power of the parties to the contract to expressly make such prospectus or pamphlet a part of the policy by reference or otherwise, that the neglect so to do ought not to give the right after delivery and acceptance thereof to vary or enlarge or disannul the provisions of a written contract which the parties have solemnly consummated, and which they are bound to know merges all prior negotiations. This rule is subject, however, to such exceptions as may exist in cases of clear estoppel or mistake, and we believe that the best considered cases and authorities make this question to depend upon the same general principles that underlie references to other papers, and which require some evidence in the policy itself of a purpose or intent to make such a prospectus or pamphlet a part of the contract, or clear evidence of an estoppel or mistake. Otherwise, serious questions might arise in construing a written contract of insurance. The presumption that a policy contains the real terms of the contract is a presumption against the existence of such prospectus or pamphlet when it is not incorporated in the policy by reference or otherwise.<sup>102</sup> And subject to the above exceptions to permit such presumption to be overcome by proof that it was intended to make such papers a part of the policy, would be to open the doors to the admission of parol evidence, establishing a different contract entirely from that evidenced by the policy which has been deliberately executed, delivered, and accepted.

<sup>102</sup> See opinion of Earl, J., in *Wheelton v. Hardisty*, 8 El. & B. 282.

§ 193. *Same Subject—The Cases.*—In a New York case<sup>103</sup> it is held that a prospectus issued by a life insurance company and delivered to the insured by the company's agent, importing that the company was careful to prevent forfeitures, and which is not referred to in, nor in any manner annexed to, the policy, is not part of the contract, and is inadmissible to control the express terms of the policy, providing that it should determine upon failure to pay the premium. This case, however, came subsequently before the same court<sup>104</sup> on a motion for reargument, based upon the ground that the attention of the court on the prior hearing was not called to several decisions in England, where a contrary ruling had been adopted upon this point. The cases referred to were *Wood v. Dwarris*,<sup>105</sup> *Wheulton v. Hardisty*,<sup>106</sup> and *Collett v. Morrison*,<sup>107</sup> and the court says these cases "do certainly hold that the prospectus might equitably be regarded as forming a part of and controlling the terms of the policy. It is not improbable that an examination of these cases would have led this court to a different conclusion," but the case was not reopened, however. In the case of *Wood v. Dwarris*<sup>108</sup> the prospectus issued by the company represented that all policies effected by it should be indisputable, except in cases of fraud, and it appeared that the prospectus was issued prior to the issuance of the policy, and the statements therein were relied upon by the insured as a basis of the contract. That when he went to the office of the company it professed to grant him assurance on those terms. These facts were held to preclude the company from defending on grounds which would leave out of consideration the prospectus,<sup>109</sup> and it was said<sup>110</sup> that it would no doubt have been competent for the company to have granted a policy upon

<sup>103</sup> *Ruse v. Mutual etc. Ins. Co.*, 23 N. Y. 516, 519; overruling s. c. 26 Barb. 556.

<sup>104</sup> 24 N. Y. 653.

<sup>105</sup> 11 Ex. 493.

<sup>106</sup> 92 Eng. C. L. 231.

<sup>107</sup> 9 Hare, 173.

<sup>108</sup> 11 Ex. (Hurl. & G.) 493.

<sup>109</sup> See opinion of Baron Alderson in this case.

<sup>110</sup> By Martin, B.

terms which would have excluded the prospectus. In the case of *Wheelton v. Hardisty*<sup>111</sup> the facts were similar, although it did not appear that the prospectus was ever in fact seen by the plaintiff, or that its statements were an inducement to him to enter into the contract, and it was held, reversing the judgment of the Queen's Bench, that the plaintiff was not entitled to a verdict, and that if a certain statement contained in a proposal as to health was intended to be the basis of the contract, it should have been inserted therein. It was further held that the prospectus was not a part of the contract, nor made so by a mere reference thereto.<sup>112</sup> The case of *Collett v. Morrison*<sup>113</sup> merely decided that if on a proposal and agreement for a life insurance a policy be drawn up at the insurance office in a form which differs from the terms of the agreement and varies the rights of the parties assured, equity will interfere and deal with the case on the footing of the agreement and not that of the policy. It is held, however, in a comparatively recent New York case<sup>114</sup> that the terms of the policy cannot be affected by a statement in the company's pamphlets that it would allow "thirty days' grace . . . on all payments" subsequent to the first. So in Tennessee<sup>115</sup> a prospectus of the company is not a part of the contract, and is not made so by a statement on the back of the policy that it may be had gratis on application. So in Georgia<sup>116</sup> a pamphlet promulgated as containing the terms and conditions upon which insurance would be granted, and which was not referred to in the policy, was held not a part of the policy and inadmissible in evidence to vary its terms, but that if referred to it might have been part of

<sup>111</sup> 8 El. & B. 285; 92 Eng. C. L. 231.

<sup>112</sup> This case was decided in 1858, the *Collett* case in 1851, and the *Wood* case in 1856.

<sup>113</sup> 9 Hare, 162.

<sup>114</sup> *Fowler v. Metropolitan L. Ins. Co.*, 116 N. Y. 389; 26 N. Y. 770; 5 Law Rep. Ann. 805; 22 N. E. Rep. 576; distinguishing *Ruse v. Mutual etc. Ins. Co.*, 23 N. Y. 516; 24 N. Y. 653; and *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 276; reversing *Fowler v. Metropolitan L. Ins. Co.*, 41 Hun. (N. Y.) 357.

<sup>115</sup> *Knickerbocker Ins. Co. v. Heidel*, 8 Lea, 483.

<sup>116</sup> *Mutual etc. Ins. Co. v. Ruse*, 8 Ga. 534.

the policy.<sup>117</sup> But in a Kentucky case<sup>118</sup> a prospectus issued by the company and shown to the assured at the time he took out the policy provided that he should be entitled to a paid-up policy after the payment of a certain number of annual premiums, and also represented that the policy was nonforfeitable. The policy itself provided for forfeiture for nonpayment of the premiums at the time when due, and that the right to a paid-up policy should be forfeited unless the original contract was surrendered within thirty days after default in payment of the premiums, and the terms of the prospectus were held to govern the rights of the insured under the contract.

**§ 194. Whether Common or Statutory Law Part of Contract.**—A contract of insurance is presumed to have been made in reference to common and statutory laws, so far as applicable, which are in force at the time of contracting. Such laws enter into and form a part of every such contract as much as if incorporated therein.<sup>119</sup> Emerigon says:<sup>120</sup> "In cases of doubt the parties are presumed to have intended to form their agreements according to the rules established by the law, which is nothing else than the universal will of the community."<sup>121</sup>

<sup>117</sup> See 1 Parsons' Marine Insurance, ed. 1868, p. 124; Bliss on Life Insurance, sec. 400; 1 Duer on Insurance, lect. 1, sec. 22, ed. 1845, p. 76, for general rule as to other papers. But see *Rohrschneider v. Knickerbocker etc. Ins. Co.* (N. Y.), 8 Ins. L. J. 392; 76 N. Y. 216; 32 Am. Rep. 290; *Continental L. Ins. Co. v. Hamilton*, 41 Ohio St. 274; *Walsh v. Aetna L. Ins. Co.*, 30 Iowa, 133; 6 Am. Rep. 664; *Clemmett v. New York L. Ins. Co.*, 76 Va. 355.

<sup>118</sup> *Southern Mutual L. Ins. Co. v. Montague*, 84 Ky. 653; 4 Am. St. Rep. 218; 2 S. W. Rep. 443.

<sup>119</sup> *Wauschaff v. Masonic Mut. B. Sec.*, 41 Mo. App. 211, where section 5981 of the Revised Statutes of Missouri, 1879, is construed and held to become a part of the contract: *Fry v. Charter Oak L. Ins. Co.*, 35 Fed. Rep. 197; *Weingartner v. Charter Oak L. Ins. Co.*, 32 Fed. Rep. 314.

<sup>120</sup> Emerigon on Insurance, Meredith's ed. 1850, 49, 555, c. 2, sec. 7.

<sup>121</sup> "Verba conventionum secundum jus commune debent intelligi. Nam jus commune informat conventiones easque interpretatur. Et si conventio est ambigua redigitur ad intellectum juri communi. Num qui contrahit praesumitur habere mentem quae congruit legis dispositioni": Id. The contract is "regulated by the general principles of justice and equity that abide in the written reason of the law": Id. "The obligation of a contract consists in its binding force on the party who

Where the construction of a statute or of the constitution becomes settled by judicial construction, such construction, so far as contract rights acquired under the statute are concerned, becomes a part of the statute itself, and necessarily, therefore, a part of the obligation of the contract.<sup>122</sup> So the construction given by courts in judicial decisions and the ordinances of commercial countries, so far as these latter may be applied or have been adopted by our own courts, are presumed to have entered into the consideration of the parties when making the contract and to have become a part thereof.<sup>123</sup> It is said in a Virginia case by the court that a statute relating to foreign insurance companies, and providing that they must have a citizen as a resident therein, and must act through him, must be read as a constituent part of the contract.<sup>124</sup> And this question arose in connection with that at issue in the case as to whether the non-payment of premium when prevented by war avoided the contract. So every contract of marine insurance is also presumed to have been made in view of commercial treaties in force between this and other maritime countries, which treaties are part of the private law of the countries parties thereto,<sup>125</sup> for no risk can be the subject of a valid marine insurance if the course of trade or voyage contravene either the laws of the land or the laws of nations.<sup>126</sup> So the parties are presumed to have knowledge of a city ordinance or local laws affecting the property and risk;<sup>127</sup> but a certificate issued prior to the enact-

makes it. This depends on the laws in existence where it is made: these are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them by the one party and the right acquired by the other": *McCracken v. Hayward*, 2 How. (U. S.) 608, 612, per Baldwin, J.

<sup>122</sup> *Douglass v. Pike Co.*, 101 U. S. 677; *Louisiana v. Pillsbury*, 105 U. S. 278, 294.

<sup>123</sup> *Taunton Cop. Co. v. Merchants' Ins. Co.*, 22 Pick. (Mass.) 111. See 1 Marshall on Insurance, ed. 1810, 19, et seq.

<sup>124</sup> *Manhattan L. Ins. Co. v. Wadsworth*, 20 Gratt. (Va.) 614, 623.

<sup>125</sup> 1 Arnould on Marine Insurance, ed. 1850, 716; s. p. 714; Lord Stowell in *The Emson*, 2 Rob. Adm. Rep. 6.

<sup>126</sup> 1 Arnould on Marine Insurance, ed. 1850, 701; s. p. 698.

<sup>127</sup> *Brady v. Northwestern Ins. Co.*, 11 Mich. 425.

ment of a statute is not within its provisions,<sup>128</sup> and if a statute is repealed before the right given thereby becomes vested by the policy, the right falls with the repeal.<sup>129</sup> And it is held that general statutory provisions inconsistent with a charter granted subsequently thereto are of no effect<sup>130</sup> if the general law of the state provides that the by-laws of an incorporated society may be changed; it enters into and forms a part of the contract.<sup>131</sup> So in another case in the United States supreme court<sup>132</sup> it is held that the rights and benefits given to the beneficiary by statute are a part of the contract. Nor is it within the power of an insurance company incorporated in a foreign state to make such provision in its contracts as to overthrow the laws of another state in which it is permitted by its laws to transact business,<sup>133</sup> and where the statute provided that in case the property was wholly destroyed by fire the amount written in the policy should "be taken conclusively to be the true value of the property when insured," and determine the measure of damages, and the terms of the policy provided a different rule, it was decided that the provisions of the statute could not be thus changed by a stipulation contra in the policy,<sup>134</sup> and it is so held in Texas.<sup>135</sup> So where the statute provides for non-forfeiture, after payment of two full annual premiums, and also provides for temporary insurance, this cannot be changed by a stipulation in the policy requiring the payment of three

<sup>128</sup> *Lindsey v. Western Mut. A. Soc.*, 84 Iowa, 734; 50 N. W. Rep. 29; Laws 21 St. Gen. Assm. Iowa, c. 65, sec. 7.

<sup>129</sup> *Pryce v. Security Ins. Co.*, 29 Wis. 270, 274.

<sup>130</sup> *York Co. Mut. F. Ins. Co. v. York.*, 48 Me. 75.

<sup>131</sup> *Stohr v. San Francisco M. F. Soc.*, 82 Cal. 557; 22 Pac. Rep. 1125.

<sup>132</sup> *Washington Cent. Nat. Bank v. Hume*, 128 U. S. 195, 206; 16 Wash. L. Rep. 777; 9 Sup. Ct. Rep. 41.

<sup>133</sup> *Fletcher v. New York L. Ins. Co.*, 4 McCrary (C. C.), 440; 13 Fed. Rep. 528.

<sup>134</sup> *Reilly v. Franklin Ins. Co.*, 43 Wis. 449; 28 Am. Rep. 552; *Oshkosh Gaslight Co. v. Germania F. Ins. Co.*, 71 Wis. 454; 1 Sanborn & B. Ann. Stat. 1889, sec. 1943. See *Wall v. Equitable L. Assur. Soc.*, 32 Fed. Rep. 273.

<sup>135</sup> *Queen Ins. Co. v. Jefferson Ice Co.*, 64 Tex. 578; Tex. Rev. Stat., sec. 2971.

full annual premiums before insured can claim temporary insurance, such stipulation being void,<sup>136</sup> and a statutory provision in the nature of a statutory limitation of actions on insurance policies cannot be eliminated from a policy by providing therein that the contract is wholly embraced in its terms and that of the application.<sup>137</sup> So an application which is not made a part of the policy in the manner provided by statute is not a part thereof, although the policy so provides.<sup>138</sup> In a case which arose in Kentucky<sup>139</sup> it was held that a provision in a statute "that all statements and descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy," was but declaratory of the law then existing in that state. It was further declared by the court that the very purpose of the statute was to bring such representations and warranties within its provisions, and to prevent the insured from losing his indemnity upon either a representation or warranty that was not fraudulent or material to the risk, and when parties have entered into an insurance contract since the adoption of this statute they must be held as contracting with reference to the statutory provision. So much of the opinion in the case of the Farmers and Drovers' Bank<sup>140</sup> which held a contrary view was declared overruled. This latter case held that when the parties undertake in the policy to declare the meaning and effect of its stipulations, they have the right to do so, and cannot

<sup>136</sup> *Wall v. Equitable L. A. Soc.*, 32 Fed. Rep. 273; *Rev. Stat. Mo.*, sec. 5983. But see *Caffrey v. John Hancock Mut. L. Ins. Co.* (Mich. 1886), 27 Fed. Rep. 85.

<sup>137</sup> *Vose v. Hawkeye Ins. Co.*, 76 Iowa, 548; 41 N. W. Rep. 300; *Acts 18th Gen. Assembly Iowa*, 1880, c. 211, sec. 3. Same effect, *Taylor v. Merchants' etc. Ins. Co.*, 83 Iowa, 402; 49 N. W. Rep. 994; same statute, *Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584; 52 N. W. Rep. 509.

<sup>138</sup> *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460; 2 Am. St. Rep. 686; 12 A. 668; *Act Pa. May 11, 1881*.

<sup>139</sup> *Germania Ins. Co. v. Rudwig*, 80 Ky. 223, under *Ky. Gen. Stat. 1887*, p. 308.

<sup>140</sup> 13 Bush (Ky), 312; 26 Am. Rep. 194.

be controlled by statute.<sup>141</sup> Under a Pennsylvania statute,<sup>142</sup> which declared that any statement in an application for a life policy, though incorrect, should not, if made in good faith, avoid the policy or be a ground of defense, it was held that this was binding, though the insured in his application warranted all statements therein to be true, and that if untrue the policy should be void notwithstanding any statute or law to the contrary.<sup>143</sup> But conditions annexed to the policy concerning notice and proof of loss control a statutory provision, as we have already seen.<sup>144</sup> *Emerigon*,<sup>145</sup> in considering the question whether one might stipulate agreements contrary to the *Ordonnance*,<sup>146</sup> which provided in terms what the policy should contain, but also provided in addition that it might contain all other covenants the parties should choose to agree upon, states the rule to be substantially this: that it might be varied from in all points not expressly prohibited and which did not concern the essence of the contract nor good morals nor public policy. It is also declared by a well-known writer<sup>147</sup> that "the right of the parties by a positive stipulation and within certain limits to vary or prevent the application of any of the rules of law by which their rights and liabilities under the contract are defined and governed, is undoubted." It will be observed that Mr. Duer's statement, if it be held to be the law, is so far qualified by the words "within certain limits," that it offers a wide field for controversy and construction. Whether the parties may evade the positive requirements of a statute in its nature mandatory, or which contain provisions in the nature of condi-

<sup>141</sup> See *Barre B. Co. v. Mulford Mut. F. Ins. Co.*, 7 Allen, 42; *Chamberlain v. Insurance Co.*, 55 N. H. 249.

<sup>142</sup> Act Pa., June 23, 1885.

<sup>143</sup> *Hermany v. Fidelity M. L. Assn.*, 151 Pa. St. 17; 24 Atl. Rep. 1064; *Barre B. Co. v. Mulford Mut. F. Ins. Co.*, 7 Allen, 42. Examine *Germania Ins. Co. v. Rudwig*, 80 Ky. 223. See *McElroy v. Continental Ins. Co.*, 48 Kan. 200, 29 Pac. Rep. 478, where it was held that the statute of limitations in the state did not conflict with that in the policy.

<sup>144</sup> *Eastern Railroad v. Relief Ins. Co.*, 98 Mass. 420.

<sup>145</sup> *Emerigon on Insurance*, Meredith's ed. 1850, 48.

<sup>146</sup> *De la Marine*, art. 3, des assur.

<sup>147</sup> 1 *Duer on Insurance*, ed. 1845, 271.



tions precedent to acquiring certain rights, is one thing; whether they may waive requirements calculated to benefit one of the parties is another matter, and whether they may waive positive prohibitions presents still another question. Emerigon's rule above stated is reasonable, beyond that, and the rulings above noted that parties cannot by agreement evade the operation of laws which contain requirements in the nature of conditions precedent to acquiring certain rights, the decisions are not clearly in harmony, with the exception perhaps that courts seem inclined, as a rule, to favor that construction which shall benefit the assured.<sup>148</sup>

**§ 195. Indorsements — Marginal References — When Part of Policy — When not.**—Where an indorsement is made upon the policy, it must appear that the parties intended that it should be considered a part thereof.<sup>149</sup> An indorsement is construed as a part of the policy when expressly referred to therein, and when so referred to it makes no difference that it is upon the back of the policy,<sup>150</sup> and the words and figures may be written transversely.<sup>151</sup> So words and figures written in the margin are generally a part of the policy.<sup>152</sup> A memorandum written on the margin prior to its execution and delivery enters into the construction of the instrument, and is a part thereof,<sup>153</sup> and all intendments are in favor of construing a policy as nonforfeitable where so defined in its margin.<sup>154</sup> So words and printed figures on the margin relating to payment of premiums are part of the policy.<sup>155</sup> The same is true of a

<sup>148</sup> See sec. 1916, herein.

<sup>149</sup> *Planters' etc. Ins. Co. v. Rowland*, 66 Md. 240.

<sup>150</sup> *St. Clair Co. B. Soc. v. Filletsam*, 97 Ill. 474; *Harris v. Eagle F. Ins. Co.*, 5 Johns. (N. Y.) 368.

<sup>151</sup> *Kenyon v. Berthon*, Doug. 12, n.

<sup>152</sup> *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151; *De Hahn v. Hartly*, 1 Term Rep. 343; *McLaughlin v. Atlantic Ins. Co.*, 57 Me. 170; *Cochran v. Retberg*, 3 Esp. 121.

<sup>153</sup> *Patch v. Phoenix etc. Ins. Co.*, 44 Vt. 487. See *Emerson v. Murray*, 4 N. H. 171; 17 Am. Dec. 407. For case where memorandum not a part, see *McQuilty v. Continental L. Ins. Co.*, 15 R. I. 573.

<sup>154</sup> *Cowles v. Continental L. Ins. Co.*, 63 N. H. 300.

<sup>155</sup> *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151.

description of goods in the margin,<sup>156</sup> and the marginal words "against actual total loss" may limit the liability.<sup>157</sup> It is held, however, that the fact that the indorsement is written on the policy does not necessarily make it a part thereof.<sup>158</sup> So where a fire policy was indorsed with a proviso that when an alteration in the property was intended to be made that certain steps should be taken to determine whether the risk would be thereby increased, it was held that such indorsement did not form a part of the policy unless referred to therein as such.<sup>159</sup>

**§ 196. Conditions Annexed to Policy, etc., When and When not Part of Same.**—Conditions, although on another paper, may be made a part of the policy by reference when annexed thereto,<sup>160</sup> and where the conditions are annexed to and delivered with a policy, they are prima facie a part thereof, although not referred to in the policy.<sup>161</sup> So conditions printed on the back and referred to in the body of the policy as follows: "In conformity with the annexed conditions," are part of the contract, even though they are unsigned.<sup>162</sup> And where the pol-

<sup>156</sup> *Guerlain v. Col. Ins. Co.*, 7 Johns. 527.

<sup>157</sup> *Burt v. Brewers' etc. Ins. Co.*, 78 N. Y. 400; 9 Hun (N. Y.), 383. That indorsements and marginal references are part of the policy, see, also, *Alabama etc. Ins. Co. v. Thomas*, 74 Ala. 578; *Wright v. Mutual B. Assn.*, 118 N. Y. 237; 16 Am. St. Rep. 749; 43 Hun (N. Y.), 61; *Ferrer v. Home Mut. Ins. Co.*, 47 Cal. 416, holds that an indorsement on the back of the policy of the name and place of business of the company by which it is issued forms no part of the policy. In this case the copies contained in the complaint did not contain this indorsement, and when the policies were offered in evidence defendant objected on the ground of not being annexed to or contained in the complaint; *Warwick v. Scott*, 4 Camp. 62; *Heygrun v. Ætna Ins. Co.*, 11 Iowa, 21. The clause "camphene cannot be used in building" is part: *Mead v. North W. Ins. Co.*, 7 N. Y. 530.

<sup>158</sup> *Caraher v. Royal Ins. Co. etc.*, 63 Hun (N. Y.), 82; 17 N. Y. Supp. 858; 44 N. Y. 141; *Stone v. United States Cas. Co.*, 34 N. J. L. 371.

<sup>159</sup> *Planters' Ins. Co. v. Rowland*, 66 Md. 236, 240; 7 Atl. Rep. 257; *Mullaney v. National etc. Ins. Co.*, 118 Mass. 393. See further as to when indorsement and marginal reference not a part, *Kingsley v. New England etc. Ins. Co.*, 8 Cush. (Mass.) 393.

<sup>160</sup> *Jennings v. Chenango Mut. Ins. Co.*, 2 Denio (N. Y.), 75.

<sup>161</sup> *Murdock v. Chenango Mut. Ins. Co.*, 2 N. Y. (2 Comst.) 210; *Hyatt v. Walt*, 37 Barb. (N. Y.) 29.

<sup>162</sup> *Kensington Nat. Bank v. Yerkes*, 86 Pa. St. 227.

icy provides that it is issued "on the special conditions stated on the back of this policy, which are hereby accepted by the assured as part of this contract," the insured is bound by the conditions so referred to.<sup>163</sup> So, also, where a policy of insurance is made "as per form attached," it is held that the provisions of the attached form must prevail over the inconsistent provisions stated in the body of the policy.<sup>164</sup> But the insured cannot generally be held bound by conditions which are printed on the back in small type where they have not been called to his attention, for usually the policy is transmitted to the insured after the agent and the insured have contracted, after the premium has been paid, and under circumstances which put it out of the power of the insured to object to such provisions inserted in it as were not in his mind or in the oral understanding which was had when he paid the premium.<sup>165</sup> Where, however, the insured accepts a policy with conditions printed on the other half of the sheet with the policy or any sheet physically attached, the intent that the two shall be taken together is presumed, although they are not referred to; but it may be shown that they were annexed by mistake.<sup>166</sup>

**§ 197. Whether Premium Note Part of Policy.**—The premium note, together with the application and policy, are generally parts of the same transaction, and are to be construed together in determining the rights of the parties.<sup>167</sup> It is also held that a promissory note given for a premium is a part of the contract, and therefore inadmissible to change the terms of the policy in relation to forfeiture.<sup>168</sup> So a condition in a note of forfeiture for nonpayment of premium is held to be nugatory where the policy contains no such provision and no condition

<sup>163</sup> *Porter v. United States L. Ins. Co.*, 160 Mass. 183; 35 N. E. Rep. 678.

<sup>164</sup> *St. Paul etc. Ins. Co. v. Kidd*, 55 Fed. Rep. 238; 22 Ins. L. J. 457.

<sup>165</sup> *Bassell v. American F. Ins. Co.*, 2 Fughes (C. C.), 531, 536.

<sup>166</sup> *Roberts v. Chenango Mut. Ins. Co.*, 3 Hill (N. Y.), 501; *Crigler v. Standard F. Ins. Co.*, 49 Mo. App. 11. See *Murdock v. Chenango Mut. Ins. Co.*, 2 N. Y. (2 Comst.) 210.

<sup>167</sup> *American Ins. Co. v. Story*, 41 Mich. 385; *Schultz v. Hawkeye Ins. Co.*, 42 Iowa, 239.

<sup>168</sup> *New England etc. Ins. Co. v. Hasbrook*, 32 Ind. 447.

that it should not take effect until the premium is paid, but is executed on the theory that the note is accepted as payment of the premium, and that the policy is to take effect upon the acceptance of the note and the delivery of the policy.<sup>169</sup> Where the note is not accepted as absolute payment it is inadmissible to contradict the terms of the policy.<sup>170</sup> It is also held that the premium note is so far a collateral instrument that the courts will not permit it to be construed so as to defeat the manifest intent of the parties expressed in the policy, as in a case where the terms of the note in relation to forfeiture are inconsistent therewith.<sup>171</sup> Other cases hold that the premium note and the policy issued by a mutual company are independent contracts.<sup>172</sup>

**§ 198. Usage—How Far a Part of Policy.**—It has been constantly adjudicated that all usages which are so well established and so well known as that parties engaged in the trade to which the usage relates are presumed to have contracted in reference thereto, become as much a part of the policy as if written therein in terms.<sup>173</sup> But such inference is repelled where the express terms of the policy or the policy itself by implication shows on its face an intent to contract without reference to usage,<sup>174</sup> for the parties may undoubtedly make whatever contract they please in this respect.<sup>175</sup> An express contract is always admissible to supersede or vary or control usage or custom, for the latter may always be waived at the will of

<sup>169</sup> *Dwelling House Ins. Co. v. Hardie*, 37 Kan. 674; 16 Pac. Rep. 92.

<sup>170</sup> *Continental Ins. Co. v. Dorman*, 125 Ind. 189; 25 N. E. Rep. 213.

<sup>171</sup> *Fithian v. Northwestern L. Ins. Co.*, 4 Mo. App. 386.

<sup>172</sup> *New England Mut. F. Ins. Co. v. Butler*, 34 Me. 451; *American Ins. Co. v. Gallahan*, 75 Ind. 168; *Shaw v. Republic L. Ins. Co.*, 67 Barb. (N. Y.) 586.

<sup>173</sup> *Martin v. Delaware Ins. Co.*, 2 Wash. (C. C.) 254; *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581; *Brough v. Whitmore*, 4 Term Rep. 206, per Butler, J.; *Trott v. Wood*, 1 Gall. (C. C.) 443; *Stevens v. Reeves*, 9 Pick. (Mass.) 198; *Colorado Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 383; *Taunton C. Co. v. Merchants' Ins. Co.*, 22 Pick. (Mass.) 111; *Rogers v. Mechanics' Ins. Co.*, 1 Story (C. C.), 603, 607, 608; *Gracie v. Marine Ins. Co.*, 8 Cranch (U. S.), 75.

<sup>174</sup> *Mobile etc. Ins. Co. v. McMillan*, 27 Ala. 77, and see cases cited in last note.

<sup>175</sup> *Parsons on Marine Insurance*, ed. 1868, p. 88.

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the parties.<sup>176</sup> Insurers, says the Connecticut supreme court, "are presumed to act and contract in reference to known and general usage, and to submit to it, and such general usage may be well enough said to become a part of all their contracts."<sup>177</sup> So Lord Mansfield declares that "every man who contracts under a usage does it as if the point of usage were inserted in the contract in terms."<sup>178</sup> The established usage as to the course of a voyage constitutes a part of the policy as much so as if expressed therein in terms.<sup>179</sup> So "what is usually done by such a ship with such a cargo in such a voyage is understood to be referred to by every policy, and to make a part of it as much as if it were expressed."<sup>180</sup> In this case the usage was to store rigging, in a particular manner universal with all European ships for many years; so a general usage among shipowners and underwriters in relation to the settlement of average loss, if known to the parties, becomes part of the contract, and binds

<sup>176</sup> *The Schooner Reeside*, 2 Sum. (C. C.) 567, 570, per Story, J.

<sup>177</sup> *Crosby v. Fitch*, 12 Conn. 422; 31 Am. Dec. 745.

<sup>178</sup> *Mason v. Skurry*, U. P. Case, per Lord Mansfield, cited in 1 Marshall on Insurance, ed. 1810, 228. "Such usages form part of the law-merchant, and to incorporate them with the policy is merely to admit the addition of known terms not inconsistent with the tenor of the instrument and well understood by the contracting parties": 1 Arnould on Insurance, Perkins' ed, 71; s. p. 72; *Id.*, p. 66, sec. 42; *Id.* 65, side p. 66. "Whatever is usually done is presumed to be foreseen and to be in the contemplation of the parties in making the contract, and is, therefore, understood to be referred to by every policy, and to make a part of it as much as if it were express": 1 Marshall on Insurance, ed. 1810, 186, citing *Pelly v. Royal Ex. Assur. Co.*, 1 Burr. 348. "While the usage is established, it becomes part of the contract, and has the same effect upon the construction of the policy as if it were adopted by express words": 1 Duer on Insurance, ed. 1845, p. 195, secs. 42, 43, et seq., p. 271. The introduction of a clause referring to usage is superfluous, "since the contract itself by legal construction, and without any express provision, fully provides for all that can be effected by a general clause of this description": 1 Phillips on Insurance, sec. 36.

<sup>179</sup> *Eyre v. Marine Ins. Co.*, 5 Watts & S. (Pa.) 116; *Bulkeley v. Protection Ins. Co.*, 2 Palne (C. C.), 82; *Salvador v. Hopkins*, 3 Burr. 1707, 1714, per Lord Mansfield; 1 Arnould on Marine Insurance, ed. 1808, 69, 360, side pp. 70, 354.

<sup>180</sup> *Pelly v. Royal Ex. Assur. Co.*, 1 Burr. 341, 350, per Lord Mansfield.

them.<sup>181</sup> In marine insurances "every policy, then, in the absence of any express stipulation to the contrary, is generally read as though it contained on the face of it an exemption in terms against liability" for goods carried on deck contrary to the usage of trade in like cases,<sup>182</sup> and a usage of a mutual benefit association that a question whether a member was a Mason in good standing should be decided by Masonic tribunals, is held to be as conclusively a part of the contract of insurance as though it provided so in terms.<sup>183</sup> Mr. Duer, in considering how far an illegal usage enters into and becomes a part of the contract of insurance, says "an illegal usage does not become a part of the contract merely by the consent of the insurers to assume its risk, but it does become a part of the contract where the effect of the policy is to sanction and encourage a practice which the law condemns, and in such cases the insurance is doubtless void."<sup>184</sup>

<sup>181</sup> *Sanderson v. Columbian Ins. Co.*, 2 Cranch (O. C.), 218.

<sup>182</sup> 1 *Arnould on Marine Insurance*, Perkins' ed., 1850, 68, 69 (citing *Taunton Cop. Co. v. Merchants' Ins. Co.*, 22 Pick. (Mass.) 108; *Wolcott v. Eagle Ins. Co.*, 4 Pick. (Mass.) 429, and other cases; *Id.*, *MacLachlan's* ed. 1887, 281, 282.

<sup>183</sup> *Connelly v. Masonic Mut. B. Assn.*, 58 Conn. 552, 557; 18 *Am. St. Rep.* 296; 20 *Atl. Rep.* 671; 9 *L. R. Annot.* 428.

<sup>184</sup> 1 *Duer on Insurance*, ed. 1845, 274.

## CHAPTER VIII.

### CONSTRUCTION OF POLICY.

- § 205. Construction generally.
- § 206. Whether same rules govern marine, fire, and life policies.
- § 207. Construction: Mutual companies: Benefit societies.
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- § 209. Construction: Intention of parties governs.
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- § 222. Same subject: The rule *contra proferentem*.
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- § 225. Construction: *Lex loci contractus*.
- § 226. Same subject: Cases.
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- § 228. Same subject: Mutual benefit societies.
- § 229. When place where policy is countersigned is place of contract.
- § 230. When place of delivery is place of contract.
- § 231. When place of acceptance and mailing is place of contract.
- § 232. Assignment: *Lex loci contractus*.

§ 205. Construction Generally. — Inasmuch as all prior negotiations are assumed to be merged in the written contract, the policy itself, in the absence of fraud, duress, or mistake must be looked to to ascertain the meaning and intent of

the parties,<sup>1</sup> and where the contract is clear, precise, and unambiguous in its terms, and the sense is manifest and leads to nothing absurd, there is no need of a resort to rules of construction,<sup>2</sup> and extrinsic evidence is then inadmissible to vary or control its terms.<sup>3</sup> If the policy be ambiguous, extrinsic evidence is admissible not to contradict or change the contract, but to develop and explain its true meaning.<sup>4</sup> Resort may then be had to the facts and circumstances attendant at the time the insurance was effected to aid the interpretation.<sup>5</sup> So conversations between the parties had at such time is held competent.<sup>6</sup> Where parties have by certain acts of their own placed a construction upon doubtful terms of a contract, this construction will be adopted by the courts as against them.<sup>7</sup>

**§ 206. Whether Same Rules Govern Marine, Fire, and Life Policies.**—The rules of marine insurance apply to

<sup>1</sup> *Higginson v. Dall*, 13 Mass. 96. See sec. 181 herein.

<sup>2</sup> *Emerigon on Insurance*, Meredith's ed. 1850, c. II, sec. 7, p. 49.

<sup>3</sup> *Dewees v. Manhattan Ins. Co.*, 35 N. J. L. (6 Vroom) 366; *Mumford v. Hallett*, 1 Johns. (N. Y.) 433; *Baltimore Ins. Co. v. Loney*, 20 Md. 36; *Burnham v. Boston M. Ins. Co.*, 139 Mass. 309. See sec. 185 herein.

<sup>4</sup> *Finney v. Bedford C. Ins. Co.*, 8 Met. (Mass.) 348; 41 Am. Dec. 515; *Sayles v. Northwestern Ins. Co.*, 2 Curt. (C. C.) 610; *Tessonn v. Atlantic Mut. Ins. Co.*, 40 Mo. 83; 93 Am. Dec. 293.

<sup>5</sup> *Fuller v. Metropolitan L. Ins. Co.*, 37 Fed. Rep. 163; *Reynolds v. Commerce Ins. Co.*, 47 N. Y. 597, per Church, C. J.; *Manger v. Holyoke Ins. Co.*, 1 Holmes (C. C.), 287, per Shipley, J.

<sup>6</sup> *Gray v. Harper*, 1 Story (C. C.), 574: "Whether parol evidence of the declarations and conversations of the parties at the time their contract was made may be received in order to show in what sense general words were in fact used by them, or to determine particular words to a distinct and particular sense, is a question that I have purposely omitted to discuss in the text. The authorities are conflicting, and I have found myself not only unable to reconcile them, but to state any distinction satisfactory to my own mind upon which the propriety of admitting the evidence can be founded": 1 *Duer on Insurance*, ed. 1845, 308. "An inquiry is often made into the history of a clause in a policy and the purpose for which it was introduced. But although this may afford some aid in arriving at its meaning, yet it cannot control the construction of its language": 1 *Parsons on Insurance*, ed. 1868, 129, citing *Hugg v. Augusta Ins. etc. Co.*, 7 How. (U. S.) 595; *Kettell v. Alliance Ins. Co.*, S. J. C., Mass. Nov. T., 1857; *Heehner v. Eagle Ins. Co.*, 10 Gray (Mass.), 131; 69 Am. Dec. 308.

<sup>7</sup> *Insurance Co. v. Dutcher*, 95 U. S. 269.



the interpretation of policies on vessels expressly employed in inland navigation when not inapplicable from the particular subject matter. In a New Hampshire case<sup>8</sup> it is declared that "great strictness has always been held in contracts of marine insurance. . . . I apprehend that from this strictness existing in the law of marine insurance have been drawn the rigid rules laid down by many tribunals upon fire insurance policies, and that the authorities in cases of marine insurance have been followed in actions upon policies against fire without perhaps sufficiently adverting to the difference that exists in the knowledge of facts upon which the respective contracts are founded. Kent says that the strictness and nicety required in the contract of marine insurance do not so strongly apply to insurance against fire, for the risk is generally assumed upon actual examination of the subject by skillful agents on the part of insurance offices.<sup>9</sup> The severity of these rules has caused courts in many instances to endeavor to avoid their effect."<sup>10</sup> It is said that insurance on lives is governed by the same legal rules which control other contracts,<sup>11</sup> and that it is to be construed by the terms in which it is couched.<sup>12</sup> But in a New York case it is held that in respect to life policies the rule in regard to the construction of the statements of the assured in the application is different from that which prevails in construing statements in applications for marine and fire policies. In applications of the former class the statements of the insured concerning his health or vital organs are not understood or intended as warranties; because the applicant may not know enough of the human system to be aware of the existence of some affection of a vital organ, and because the insurers are supposed to rely upon the opinions of their own medical advisers;<sup>13</sup> and in a

<sup>8</sup> *Campbell v. Merchants' etc. Ins. Co.*, 37 N. H. 43; 72 Am. Dec. 324, per Eastman, J.

<sup>9</sup> 3 Kent's Commentaries, 373.

<sup>10</sup> *Caldwell v. St. Louis Ins. Co.*, 1 La. Ann. 85.

<sup>11</sup> *St. John v. American Mut. L. Ins. Co.*, 13 N. Y. 31, 39; 64 Am. Dec. 529.

<sup>12</sup> *Law v. London etc. Co.*, 1 Jur., N. S., 178; *Connecticut Mut. etc. Ins. Co. v. Pyle*, 44 Ohio St. 19; 4 N. E. Rep. 465.

<sup>13</sup> *Horn v. Amicable etc. Ins. Co.*, 64 Barb. (N. Y.) 81.

United States supreme court case<sup>14</sup> it is declared that "policies of life insurance are governed in some respects by different rules of construction from those applied by the courts in cases of policies against marine risks or policies against loss by fire," which are contracts of indemnity, while "life insurance is not necessarily one merely of indemnity for a pecuniary loss," and we apprehend that this is true whether life insurance be considered a contract of indemnity or only a contract for the payment of a fixed sum. So the court declares in an Alabama case that "a contract of life insurance is simpler in form in the relative rights and duties of the insurer and the assured, and differs in many respects from marine or from fire insurance, and yet the general principles applicable to marine or fire insurance are applied, so far as consistent with the nature and obligations of the contract, to the contract of life insurance."<sup>15</sup> And it is said by the court in *Chartrand v. Brace*<sup>16</sup> that "a policy of life insurance is in the nature of a testament, and although not a testament, in construing it the courts will, so far as possible, treat it as a will."<sup>17</sup> And the question involved might arise in the construction of wills. It is held in *Jolly v. Baltimore etc. Society*<sup>18</sup> that in the construction of policies of fire insurance the same strictness is not to be observed as in the construction of policies of marine insurance.

**§ 207. Construction — Mutual Companies — Benefit Societies.**—It is a general rule that contracts of insurance with a mutual company are construed in most respects like other policies,<sup>19</sup> although it is said that "the business of insurance against fire has been greatly increased by the incorporation and establishment of mutual companies, and the mode of

<sup>14</sup> *Insurance Co. v. Bailey*, 13 Wall. (U. S.) 616, 619.

<sup>15</sup> *Supreme Commandery etc. v. Ainsworth*, 71 Ala. 436, 446; 46 Am. Rep. 332.

<sup>16</sup> 16 Col. 19; 32 Cent. L. J. 410.

<sup>17</sup> *Citing Bolton v. Bolton*, 73 Me. 299.

<sup>18</sup> 1 Har. & G. (Md.) 295; 18 Am. Dec. 288.

<sup>19</sup> *Elkhart etc. Assn. v. Houghton*, 103 Ind. 236; 53 Am. Rep. 514; *New England etc. Co. v. Butler*, 34 Me. 451; *Willcuts v. Northwestern Mut. L. Ins. Co.*, 81 Ind. 300; *Bacon's Benefit Societies and Life Insurance*, sec. 180.

transacting business, as well as the property insured, differs very essentially from that of marine insurance. The method of doing business in these companies also varies materially in some respects from that which prevails in stock companies, as they are usually termed. And were courts now for the first time to lay down, without regard to authority, the rules of law that should govern contracts made between mutual companies and their members, I apprehend that in many jurisdictions they would differ essentially from the rules which at present prevail.”<sup>20</sup> But the interpretation can be no different in the policies or certificates in such companies than in other insurance contracts, where the words are used for a definite purpose, and relate to clearly defined transactions, as that a policy shall be void if the insured die in known violation of any law.<sup>21</sup> If the language of such contracts be plain, unambiguous, and well understood to have a fixed meaning, either generally or as technical terms of law, that meaning will be given the same as in case of other contracts of insurance,<sup>22</sup> and the courts will adjudicate the rights of members in reference to certificates in such companies upon the same principles as apply to insurance companies.<sup>23</sup> So the policy, the conditions annexed thereto, the charter, and by-laws of the company must be all construed together in cases of discrepancy,<sup>24</sup> and the by-laws, it is held, must receive the interpretation put upon the contracts of which they are a part;<sup>25</sup> and it is held that the charter and by-laws must be liberally construed to effectuate the purposes contemplated,<sup>26</sup> although other courts have adhered to a different rule limiting the company or society strictly to the exercise of those

<sup>20</sup> *Campbell v. Merchants' etc. Ins. Co.*, 37 N. H. 44, per Eastman, J.

<sup>21</sup> *Cluff v. Mutual etc. Ins. Co.*, 99 Mass. 317.

<sup>22</sup> *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122.

<sup>23</sup> *Goodman v. Jedidjah Lodge*, 67 Md. 117. See *Chartrand v. Brace*, 16 Col. 19; 32 Cent. L. J. 410.

<sup>24</sup> *Hyatt v. Wait*, 37 Barb. (N. Y.) 29. See cases in secs. 175, 176, 185-88, herein.

<sup>25</sup> *Wiggins v. Knights of Pythias*, 31 Fed. Rep. 122.

<sup>26</sup> *Ballou v. Gile*, 50 Wis. 614; *Erdman v. Insurance Co.*, 44 Wis. 376; *Maniely v. Knights etc.*, 115 Pa. St. 305; 7 Cent. Rep. 633; 9 Atl. Rep. 41, 43; *Elsev v. Odd Fellows' Assn.*, 142 Mass. 224; *Supreme Lodge etc. v. Schmidt*, 98 Ind. 374.

powers conferred by their charter.<sup>27</sup> But it is held that a stipulation in the policy repugnant to a provision in the act of incorporation controls the latter,<sup>28</sup> and the same is held to be true where by-laws are inconsistent with the provisions of the policy, the company having power under its charter to issue such a policy.<sup>29</sup> But the practice and opinion of the officers of such companies as to the meaning of words used in the rules, regulations, and by-laws cannot change by construction the plain terms of the policy or affect the rights of the parties.<sup>30</sup> So the customs and usages adopted by the society are inadmissible to supersede the regularly adopted by-laws and thus change the contract.<sup>31</sup>

**§ 208. Policies Construed Like Other Written Contracts.**—Policies of insurance are subject to the rules of construction which are applicable to other contracts.<sup>32</sup> So Nelson, J., declares that "there is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts."<sup>33</sup> The clause in a policy of insurance requiring the certificate of a magistrate as to the character of the assured and the amount of the loss is to be construed as liberally as ordinary contracts,<sup>34</sup> though a policy of insurance may be avoided by

<sup>27</sup> *National Mut. A. Assn. v. Gonser*, 43 Ohio St. 1; *Knights of Honor v. Nairn*, 60 Mich. 44. And see *Bacon's Benefit Societies and Life Insurance*, secs. 170, 244, 245.

<sup>28</sup> *Howard v. Franklin etc. Ins. Co.*, 9 How. Pr. (N. Y.) 45. See *Bacon's Mutual Benefit Societies and Life Insurance*, sec. 178.

<sup>29</sup> *Davidson v. Old People's Mut. B. Soc.*, 39 Minn. 303; 1 L. R. Annot. 482. But see *Bacon's Mutual Benefit Societies and Life Insurance*, sec. 178.

<sup>30</sup> *Wiggin v. Knights of Pythias*, 31 Fed. Rep. 122; *Manson v. Grand Lodge A. O. U. W.*, 30 Minn. 509.

<sup>31</sup> *District Grand Lodge v. Cohn*, 20 Ill. App. 335; *Davidson v. Knights of Pythias*, 22 Mo. App. 263.

<sup>32</sup> *Aurora F. Ins. Co. v. Eddy*, 49 Ill. 106; *Crane v. City Ins. Co.*, 3 Fed. Rep. 558; *St. John v. American Mut. L. Ins. Co.*, 13 N. Y. 21, 39; 64 Am. Dec. 529; *Wells, Fargo Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Higginson v. Dall*, 13 Mass. 96, 98; *Weidert v. State Ins. Co.*, 19 Or. 261; 19 Ins. L. J. 740; 24 Pac. Rep. 242; *Robertson v. French*, 4 East, 135, per Lord Ellenborough; *Pindar v. Resolute F. Ins. Co.*, 47 N. Y. 114, per Rapallo, J.; *Goix v. Low*, 1 Johns. Cas. (N. Y.) 341, per Kent, J.

<sup>33</sup> *Turley v. Insurance Co.*, 25 Wend. (N. Y.) 376.

<sup>34</sup> *Turley v. Insurance Co.*, 25 Wend. (N. Y.) 375.

representations and concealments, which would not be allowed to affect the force of any other contract, if they materially affect the risk, yet with regard to its other incidents, it is subject to the same rules of construction as other contracts. Thus, it is no defense to an action on a premium note that false representations were made when such representations were plainly contradictory to the terms of the note itself.<sup>35</sup>

**§ 209. Construction—Intention of Parties Governs.—**

The cases are numerous which hold that the first object of construction is to ascertain the intention or meaning of the parties, and to understand the contract accordingly.<sup>36</sup> It is said by Denman, C. J.,<sup>37</sup> that the question is "not what was the intention of the parties, but what is the meaning of the words they have used."<sup>38</sup> In this case the parties had failed, by apt and proper words, to express their intention, and the contract was construed in accordance with the meaning of the terms employed. In connection with this case we suggest that, if the words used are clear and precise, it is not an unreasonable presumption that the parties intended that meaning which the words used fairly express, even though the parties may have actually intended otherwise, and if the meaning of the words is obscure, it is but just that other aids should be resorted to to ascertain what meaning the parties intended to convey by the words they have used.<sup>39</sup> The general rule is, that

<sup>35</sup> *Farmers' Mutual F. Ins. Co. v. Marshall*, 29 Vt. 23.

<sup>36</sup> *Emerigon on Insurance*, Meredith's ed. 1850, c. II, sec. 7, p. 49. "The instrument avails nothing beyond the intention of the parties": *Id.*, c. I, sec. 5, p. 17; *Wells, Fargo Co v. Pacific Ins. Co.*, 44 Cal. 397, 406; *Blinn v. Dresden M. F. Ins. Co.*, 85 Me. 389; *Marco v. Liverpool etc. Ins. Co.*, 35 N. Y. 664; *Manger v. Holyoke Ins. Co.*, 1 Holmes (C. C.), 289; *Maryland Ins. Co. v. Bossiere*, 9 Gill & J. (Md.) 121; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 158; 86 Am. Dec. 362; *Parkhurst v. Smith, Willes*, 332, per Willis, C. J.; *Patapsco Ins. Co. v. Biscoe*, 7 Gill & J. (Md.) 293; 28 Am. Dec. 219.

<sup>37</sup> *Rickman v. Carstars*, 5 Barn. & Adol. 651, 663.

<sup>38</sup> See, also, *Holmes v. Charlestown M. F. Ins. Co.*, 10 Met. (Mass.) 211; 43 Am. Dec. 428.

<sup>39</sup> *Emerigon* says: "If the party who could and should have explained himself clearly and precisely has not done so, it is so much the worse for him . . . ; the just construction of an instrument should tend only to discover the meaning of its author or authors":

the intent is to be obtained first from the language of the entire policy in connection with the risk or subject matter,<sup>40</sup> but if the language is ambiguous and obscure, and does not in itself discover the intent, then resort may be had to usage or to the surrounding circumstances existing at the time the contract was made.<sup>41</sup> This intent should not be contrary to legal principles or rules of law,<sup>42</sup> and it should be looked to rather than to any grammatical accuracy in the use of language,<sup>43</sup> and is rather to be regarded than the strict literal sense of the words.<sup>44</sup> Where the language evidences that the assured intended to do or omit an act material to the risk, it will be so construed, and the assured must reserve the right to change his intention by explicit language.<sup>45</sup> Mr. Parsons<sup>46</sup> inquires, Which intent governs where there is reason to believe that one of the parties intended one thing and the other another thing? It would seem, however, that the intent ought to be a concurrent one, that is, not the intent alone of either the insurer or insured, but one upon which the minds of the parties met.<sup>47</sup> So it is said

*Emerigon on Insurance*, Meredith's ed. 1850, c. II, sec. 7, p. 49. This learned writer also declares that "the words of the contract are to be taken together with the intention of the parties. *Verba contractus assecurationes et mentem contrahentium esse attendenda*". Id., c. I, sec. 5, p. 17.

<sup>40</sup> *Moore v. Protection Ins. Co.*, 29 Me. 97; 48 Am. Dec. 514; *McCluer v. Girard F. & M. Ins. Co.*, 43 Iowa, 349; *Blinn v. Dresden M. F. Ins. Co.*, 85 Me. 389; 27 Atl. Rep. 263; *Weldert v. State Ins. Co.*, 19 Or. 261; 19 Ins. L. J. 740; 24 Pac. Rep. 242; *Goodrich v. Treat*, 3 Col. 408; *Savage v. Howard Ins. Co.*, 44 How. Pr. (N. Y.) 40, 51; 52 N. Y. 502, 504; 11 Am. Rep. 741; *Foot v. Aetna L. Ins. Co.*, 61 N. Y. 571.

<sup>41</sup> *Savage v. Howard Ins. Co.*, 44 How. Pr. (N. Y.) 40, 51; 52 N. Y. 502, 504; 11 Am. Rep. 741; *Marco v. Liverpool etc. Ins. Co.*, 35 N. Y. 604; *Philadelphia etc. Co. v. British American Assur. Co.*, 132 Pa. St. 236, 24; 25 Week. Not. Cas. 370.

<sup>42</sup> *Patapsco Ins. Co. v. Biscoe*, 7 Gill & J. (Md.) 293; 28 Am. Dec. 219; *Parkhurst v. Smith*, Willes, 332, per Willes, C. J.

<sup>43</sup> *Palmer v. Warren Ins. Co.*, 1 Story (C. C.), 360, 365, per Story, J.; *Bradley v. Nashville Ins. Co.*, 3 La. Ann. 708; 48 Am. Dec. 465.

<sup>44</sup> *Cross v. Shutliffe*, 2 Bay (S. C.), 220; 1 Am. Dec. 645; *Eyre v. Marine Ins. Co.*, 6 Whart. (Pa.) 249, 254.

<sup>45</sup> *Bilbrough v. Metropolis Ins. Co.*, 5 Duer (N. Y.), 587.

<sup>46</sup> 1 Parsons on Insurance, ed. 1868, 75.

<sup>47</sup> See 1 Duer on Insurance, ed. 1845, 150, 160; *Holmes v. Charles-town etc. Ins. Co.*, 10 Met. (Mass.) 211, 216; 43 Am. Dec. 428, where the

that there is no principle of law "which allows the understanding of one of the parties to determine the meaning of the contract." <sup>48</sup>

**§ 210. Construction—Reference Must be Had to Nature of Risk and Subject Matter.**—The language of a policy must be construed with reference to the subject matter and the nature of the property to which it is applied, and with a view to the objects and intentions of the parties as the same may be gathered from the whole instrument.<sup>49</sup> An accident policy must be construed with reference to the subject to which it is applied,<sup>50</sup> and in case of a policy upon livestock it has been said that "such policies must be presumed to have been made with reference to the purposes for which such property is ordinarily used, as well as the manner in which it is usually kept."<sup>51</sup> It may be added as within this rule that the terms and conditions of a policy should be construed, if possible, so as to give them a meaning reasonably applicable to the kind of insurance upon the particular species of property insured,"<sup>52</sup> and construction should be liberal, having in view in the case of marine policies, the nature of the voyage, and the intent of the parties.<sup>53</sup> So a provision in the policy against loss by fire avoiding the policy if the property becomes encumbered has been held not to include encumbrance by judgment, although within the terms used.<sup>54</sup> So the court declares in a New York case that "this policy, like any other contract between parties,

court refused to apply insurance to certain chattels, although it appeared that the insured intended to cover them.

<sup>48</sup> *Montgomery v. Firemen's Ins. Co.*, 16 B. Mon. (Ky.) 427, 441, per Marshall, C. J.

<sup>49</sup> *Allegre v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136; 20 Am. Dec. 424; *De Graff v. Queen Ins. Co.*, 38 Minn. 501; 8 Am. St. Rep. 685; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362.

<sup>50</sup> *Healey v. Mutual Acc. Assn.*, 133 Ill. 556; 23 Am. St. Rep. 637; 31 Cent. L. J. 419, per Craig, J.; *Rockford Ins. Co. v. Nelson*, 65 Ill. 420.

<sup>51</sup> *Citing Halbrook v. Insurance Co.*, 25 Minn. 229; *Boright v. Insurance Co.*, 34 Minn. 352; 25 N. W. Rep. 796.

<sup>52</sup> *De Graff v. Queen Ins. Co.*, 38 Minn. 501; 8 Am. St. Rep. 685, per Mitchell, J.

<sup>53</sup> *Columbia Ins. Co. v. Catlett*, 12 Wheat. (U. S.) 386, per Story, J.

<sup>54</sup> *Baley v. Homestead F. Ins. Co.*, 80 N. Y. 21; 36 Am. Rep. 570.

is to be construed not merely by the letter, but by the spirit. We must read it in connection with the whole subject matter to which it relates, and give to language its ordinary and natural meaning. If, then, the intention of the parties becomes manifest, such intention must prevail.”<sup>55</sup>

**§ 211. Construction must be Reasonable.**—The construction of policies of insurance must not be that which would lead to an absurdity, but must be reasonable with reference to the risk and subject matter,<sup>56</sup> so as not to defeat the intention of parties,<sup>57</sup> and when a reasonable construction can be had without recourse to extrinsic evidence, such evidence is inadmissible.<sup>58</sup>

**§ 212. Contract Should be Given Effect if Possible.**—The whole policy with all its parts should be construed together as one entire contract,<sup>59</sup> and such meaning should be given thereto as to carry out and effectuate to the fullest extent the intention of the parties; no portion should receive such a construction as will defeat the obvious intent,<sup>60</sup> and the construction should be liberal rather than critical or technical,<sup>61</sup> for technical constructions are not favored.<sup>62</sup> The contract should be given effect if possible, rather than made void, for only a

<sup>55</sup> *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 477; 8 Am. St. Rep. 758, 761.

<sup>56</sup> *Byre v. Marine Ins. Co.*, 5 Watts & S. (Pa.) 117; *Turley v. North America F. Ins. Co.*, 25 Wend. (N. Y.) 377; *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33; 93 Am. Dec. 293; *Springfield F. & M. Ins. Co. v. McLimaus*, 27 Neb. 649; 45 N. W. Rep. 171.

<sup>57</sup> *West v. Citizens' Ins. Co.*, 27 Ohio St. 1; 22 Am. Rep. 294.

<sup>58</sup> *Baltimore Ins. Co. v. Lorey*, 20 Md. 36.

<sup>59</sup> See *Chrisman v. State Ins. Co.*, 16 Or. 283; 18 Pac. Rep. 466. Cases under secs. 185-88, herein.

<sup>60</sup> *Crane v. City Ins. Co.*, 3 Fed. Rep. 558.

<sup>61</sup> *Palmer v. Warren Ins. Co.*, 1 Story (C. C.), 365, per Story, J.; *Crane v. City Ins. Co.*, 3 Fed. Rep. 558; *Alabama G. L. Ins. Co. v. Johnston*, 80 Ala. 467; 60 Am. Rep. 112; *McNamara v. Dakota F. & M. Ins. Co.*, 1 S. Dak. 342; 47 N. W. Rep. 288; *Allegre v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136; 20 Am. Dec. 424; *Pual v. Travelers' Ins. Co.*, 112 N. Y. 479; 8 Am. St. Rep. 758, 762; *Riggin v. Patapsco Ins. Co.*, 7 Har. & J. (Md.) 279; 16 Am. Dec. 302.

<sup>62</sup> *Miller v. Mutual B. L. Ins. Co.*, 81 Iowa, 226; 7 Am. Rep. 122, per the Court; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222.



stern legal necessity will warrant a construction that would nullify the policy.<sup>63</sup> Doubtful clauses should not be considered separately, and discrepancies must, if possible, be reconciled. Resort may be had to other parts to ascertain the meaning and intent of the parties.<sup>64</sup> The premium may be resorted to to discover the amount intended to be insured,<sup>65</sup> for the intent is to be gathered from the surrounding clauses and from all parts of the instrument, and the words should be taken in that sense to which the apparent object and intention of the parties limit them.<sup>66</sup>

**§ 213. Construction—Rejection of Words and Clauses.**

Every word and every sentence should be given effect, and no part be ineffectual or rejected as superfluous, in order that the whole contract may stand together,<sup>67</sup> and if the words are susceptible of a rational and intelligible meaning which is consistent with the object and purposes evidenced by the entire policy, no part should be rejected as inoperative,<sup>68</sup> for a construction should be given that will carry into effect, if possible, all the provisions of the policy.<sup>69</sup> But where printed and written portions of the policy are contradictory, the printed will be re-

<sup>63</sup> *McNamara v. Dakota F. & M. Ins. Co.*, 1 S. Dak. 342; 47 N. W. Rep. 288; *Franklin L. Ins. Co. v. Wallace*, 93 Md. 7; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. (14 Vroom) 300; 39 Am. Rep. 584, 586; *Stacey v. Franklin F. Ins. Co.*, 2 Watts & S. (Pa.) 506; *Evans v. Phoenix Mut. R. Assur.* (Pa. 1892), 49 Leg. Intell. 15; 9 Lancaster Law Rev. 59; *Phoenix Ins. Co. v. Tomlinson*, 125 Md. 84; 21 Am. St. Rep. 203, 211; *Baley v. Homestead F. Ins. Co.*, 80 N. Y. 21; 36 Am. Rep. 570; *Brink v. Merchants' Ins. Co.*, 49 Vt. 442; *Burkhard v. Travelers' Ins. Co.*, 102 Pa. St. 262; 48 Am. Rep. 205.

<sup>64</sup> 1 Duer on Insurance, ed. 1845, 165, sec 10. "Indeterminate forms of expression . . . are to be understood in a sense subservient to the general purposes of the contract": *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 413; 88 Am. Dec. 337.

<sup>65</sup> *Port v. Phoenix Ins. Co.*, 10 Johns. (N. Y.) 79, 84.

<sup>66</sup> *Paul v. Travelers' Ins. Co.*, 112 N. Y. 479; 8 Am. St. Rep. 758, 762, per the Court, citing *Yeaton v. Fry*, 5 Cranch (U. S.), 335; *White v. Hudson River Ins. Co.*, 15 How. Pr. (N. Y.) 288; *Hoffman v. Aetna etc. Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 337.

<sup>67</sup> *Chrisman v. State Ins. Co.*, 16 Or. 284; 18 Pac. Rep. 466.

<sup>68</sup> *Stettiner v. Granite Ins. Co.*, 5 Duer (N. Y.), 594, 597.

<sup>69</sup> *Springfield F. & M. Ins. Co. v. McLimans*, 28 Neb. 846; 45 N. W. Rep. 171.

jected.<sup>70</sup> Words in the policy will not be so construed as lead to unreasonable results.<sup>71</sup> Portions of the description which are false will be disregarded if enough remains to identify the property.<sup>72</sup>

**§ 214. General and Special Clauses.**—The general clauses, says Emerigon, are to be interpreted, generally, as they are written.<sup>73</sup> But general words, says Lord Bacon,<sup>74</sup> “not express and precise, shall be restrained unto the fitness of the matter and the person,” and general words may be aptly restrained according to the subject matter or person to which they relate.<sup>75</sup> A special clause in a policy which creates an exception to a general clause governs the latter,<sup>76</sup> and a special stipulation in a certificate will control a general stipulation therein.<sup>77</sup> The clauses are to be taken literally when clear in themselves,<sup>78</sup> but the literal application of words may be controlled by other parts of the policy.<sup>79</sup>

**§ 215. Construction will be Given to Uphold the Law.** When a law is susceptible of two constructions, the one which will give effect to the law, rather than the one which would render the law unconstitutional, must be adopted.<sup>80</sup> And it is held

<sup>70</sup> *Hernandez v. Sun Mut. Ins. Co.*, 6 Blatchf. (C. C.) 317.

<sup>71</sup> *Ogden v. Columbia Ins. Co.*, 10 Johns. (N. Y.) 273.

<sup>72</sup> *Patch v. New Zealand Ins. Co.*, 67 Cal. 122.

<sup>73</sup> “The contracting parties are to impute to themselves the inconvenience of not having affixed any instructions. These rules are taught us by all our doctors”: Emerigon on Insurance, Meredith's ed. 1850, 48, 49. “The general clauses are to be construed as they are written, and because it depends on the parties either not to stipulate them or to modify them”: Emerigon on Insurance, Meredith's ed. 1850, c. xii, sec. 45, p. 513.

<sup>74</sup> Bacon's Law Max. Reg. 10.

<sup>75</sup> *Sawyer v. Dodge Co. Mut. Ins. Co.*, 37 Wis. 503.

<sup>76</sup> *Mitchell F. Co. v. Imperial F. Ins. Co.*, 17 Mo. App. 627; *Bowman v. Pacific Ins. Co.*, 27 Mo. 152.

<sup>77</sup> *Northwestern Mut. Ins. Co. v. Hazelett*, 105 Ind. 212; 55 Am. Rep. 192; 4 N. E. Rep. 582.

<sup>78</sup> “In contractu assecurationis inspici debet in tantum, quod certum est inter contrahentes”: Emerigon on Insurance, Meredith's ed. 1850, c. ii, sec. 7, p. 49; c. i, sec. 2, p. 16.

<sup>79</sup> *Grant v. Delacour*, 1 Taunt. 466.

<sup>80</sup> *New Orleans v. Salamander Co.*, 25 La. Ann. 650.

that a statute controls where the terms of the policy conflict therewith.<sup>81</sup>

**§ 216. Words are to be Construed in Ordinary and Popular Sense.**—Words are to be construed in their ordinary, usual, and popular sense, unless they have been given a contrary, legal construction, or have acquired a distinct commercial meaning by usage, or are peculiar to some art, trade, or science, and have thereby acquired a technical meaning, or unless it is apparent from the context that a distinct and particular meaning was intended;<sup>82</sup> and this rule is in accordance with all the authorities. So Emerigon says: “The true meaning of an expression in its ordinary use is the idea that people are accustomed to attach to it.”<sup>83</sup> And Lord Ellenborough declares that the policy “is to be construed according to its sense and meaning as collected, in the first place, from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.”<sup>84</sup> So Chancellor Walworth declares that “a policy of insurance, like any other contract, is to be construed by the popular understanding or the plain and ordinary sense of the terms employed, unless those terms have received a legal con-

<sup>81</sup> *Fidelity Mutual L. Assn. v. Fichlin*, 74 Md. 172; 23 Atl. Rep. 197; *Fletcher v. New York L. Ins. Co.*, 4 McCrary (C. C.), 440; 13 Fed. Rep. 528; *Taylor v. Merchants' etc. Ins. Co.*, 83 Iowa, 402; 49 N. W. Rep. 994; *Marsden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584; 52 N. W. Rep. 509; *Wall v. Equitable L. Assur. Soc.*, 32 Fed. Rep. 273. But see sec. 194, herein.

<sup>82</sup> *Whitmarsh v. Conway Ins. Co.*, 16 Gray (Mass.), 359; 77 Am. Dec. 414; *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466; *De Longuemere v. New York F. Ins. Co.*, 10 Johns. (N. Y.) 120.

<sup>83</sup> Emerigon on Insurance, Meredith's ed. 1850, c. II, sec. 7, p. 50. And this presumption cannot be overcome but by a stronger presumption contra: *Id.*

<sup>84</sup> *Robertson v. French*, 4 East, 135, per Lord Ellenborough.

struction or have acquired a technical meaning in reference to the subject matter of the contract.”<sup>85</sup> So answers to questions must be taken in the popular sense of the language used,<sup>86</sup> and the words “jewelry and clothing, being stock in trade,” will be construed in their ordinary and popular sense, and as not including musical and surgical instruments, etc., in the absence of evidence that a particular meaning has attached to the words by usage.<sup>87</sup>

**§ 217. Construction—Technical, etc., Words.**—Where a word has acquired by usage in trade or commerce a meaning peculiar thereto, or is a word of technical<sup>88</sup> application, as where used in some art, trade, or science, or where it appears from the context that words are used in a particular sense to compass the intent of the parties, such meaning may be shown by proper evidence, and the exact technical and commercial meaning or particular meaning will govern;<sup>89</sup> and “technical terms or terms proper to the arts and sciences are ordinarily to be understood according to the definition given them by masters in the art.”<sup>90</sup> Illustrations under this rule will be found throughout this work under the several heads to which they properly belong.

**§ 218. Addition of Words by Construction.**—In the case of *Davis v. Boardman*<sup>91</sup> the words “or either of them” were inserted by construction after the word “cargo” in the clause “should this vessel and cargo be insured in England in time to

<sup>85</sup> *Dow v. Whitten*, 8 Wend. (N. Y.) 160, 167, per Chancellor Walworth. See criticism 1 Duer on Insurance, ed. 1845, 229, et seq.

<sup>86</sup> *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362.

<sup>87</sup> *Rafel v. Nashville M. & F. Ins. Co.*, 7 La. Ann. 244.

<sup>88</sup> See secs. 246-255, herein.

<sup>89</sup> *Whitmarsh v. Conway Ins. Co.*, 16 Gray (Mass.), 359; 77 Am. Dec. 414; *Fowler v. Aetna Ins. Co.*, 7 Wend. (N. Y.) 270; 1 Phillips on Insurance, 3d ed., sec. 143, et seq.; *Bacon's Benefit Societies and Life Insurance*, 1st ed., secs. 256, 264; *Horne v. Mutual S. Ins. Co.*, 1 Sand. (N. Y.) 137; 2 N. Y. (2 Comst.) 235, per Sandford, J.; *Robertson v. Mooney*, 1 R. & M. 75.

<sup>90</sup> *Emerigon on Insurance*, Meredith's ed. 1850, c. 11, sec. 7, p. 50.

<sup>91</sup> 12 Mass. 80.

attach," etc., the court saying that it was not unusual "to find 'and' used for 'or' and 'or' for 'and.' " <sup>92</sup>

**§ 219. Courts cannot Extend or Enlarge by Construction.**—If the terms of the contract are express, the court cannot extend or enlarge the contract by implication so as to embrace an object distinct from that originally contemplated.<sup>93</sup> In insurance contracts the insurer undertakes to guarantee the insured against loss or damage upon the exact terms and conditions specified in the agreement, and upon no other, and therefore, courts cannot change the contract nor make a new one for the parties. It is their duty to enforce and carry out the one already made.<sup>94</sup> So a benefit certificate payable to certain children cannot be enlarged by construction so as to include a posthumous child by a second marriage contracted after the insured became a member of the society,<sup>95</sup> nor will conditions limiting the insurer's liability be extended to include cases not reasonably and clearly within the words,<sup>96</sup> nor will a construction be given which would enlarge or diminish the risk to an unreasonable extent,<sup>97</sup> nor can the court apply the insurance to chattels not insured, even though the policy holder intended to insure them.<sup>98</sup>

**§ 220. Forfeitures and Exceptions not Favored by Construction.**—Where the intent of conditions involving disabilities or forfeitures is doubtful, they should be construed

<sup>92</sup> See *United L. F. & M. Ins. Co. v. Foote*, 22 Ohio St. 340. The words "by fire" were added by construction: *Contra, Commercial Insurance Co. v. Robinson*, 64 Ill. 265.

<sup>93</sup> "It is never allowed to stretch the contract from one case to another, nor to make it embrace an object really distinct from that originally contemplated": *Emerigon on Insurance*, Meredith's ed. 1850, c. 1, sec. 7, p. 16; *Waxahachie Bank v. Lancashire Ins. Co.*, 62 Tex. 461.

<sup>94</sup> *Glendale Mfg. Co. v. Protection Ins. Co.*, 21 Conn. 19, 30, 31; 54 Am. Dec. 309, per Ellsworth, J.

<sup>95</sup> *Sprey v. Williams*, 82 Iowa, 61; 47 N. W. Rep. 890; 10 L. R. Annot. 863.

<sup>96</sup> *Rann v. Home Ins. Co.*, 59 N. Y. 387.

<sup>97</sup> *Eyre v. Marine Ins. Co.*, 6 Whart. (Pa.) 247.

<sup>98</sup> *Holmes v. Charlestown M. F. Ins. Co.*, 10 Met. (Mass.) 211; 43 Am. Dec. 428.

against the party for whose benefit they were imposed,<sup>99</sup> for the right to insist upon forfeitures is stricti juris, and courts will not favor forfeitures by literal intendments and enlarged constructions,<sup>100</sup> and words of limitation in the nature of an exception will be construed against the party preferring them,<sup>101</sup> and a prohibition against the transfer of a policy will be construed strictly.<sup>102</sup> So conditions in a policy of insurance which create restrictions on the remedy of the insured thereon, as that he shall sue within a certain time, are to be strictly construed.<sup>103</sup>

**§ 221. Construction Should be Liberal in Favor of Assured and for Benefit of Trade.**—It has long been determined with an almost unwavering unanimity that insurance contracts, when susceptible of more than one interpretation, shall be construed in favor of the assured. This rule is imperative and undoubted, since to hold otherwise, without an absolute necessity therefor, would tend to subvert the very object and purposes of insurance, which is that of indemnity to the assured in case of loss, or the payment of money on the happening of a contingency.<sup>104</sup> And this is true of certificates in mu-

<sup>99</sup> *McNamara v. Dakota etc. Ins. Co.*, 1 S. Dak. 342; 47 N. W. Rep. 288; *Colton v. Fidelity etc. Co.*, 41 Fed. Rep. 506; *Burnett v. Eufaula etc. Ins. Co.*, 46 Ala. 11; 7 Am. Rep. 581; *Evans v. Phoenix Mut. Assn. etc.*, 1892, 49 Leg. Intell. 15; *Liverpool etc. Ins. Co. v. Verdier*, 33 Pa. 138; *Livingston v. Stickles*, 7 Hill (N. Y.), 253; *Alabama etc. Ins. Co. v. Johnston*, 80 Ala. 467; 2 S. Rep. 128, per the Court; 60 Am. Rep. 112; *Yeaton v. Fry*, 5 Cranch (U. S.), 335.

<sup>100</sup> *Aurora etc. Ins. Co. v. Eddy*, 55 Ill. 213. See *Fitzpatrick v. Mutual etc. L. Ins. Co.*, 25 La. Ann. 443.

<sup>101</sup> *Schroeder v. Stock & Mut. Ins. Co.*, 46 Me. 174; *Bullen v. Denning*, 5 Barn. & C. 842; *Palmer v. Warren Ins. Co.*, 1 Story (C. C.), 360, per *Story, J.*; *Donnel v. Columbian Ins. Co.*, 2 Sum. (C. C.) 380, 381; *Earl of Cardigan v. Armitage*, 2 Barn. & C. 197.

<sup>102</sup> *Griffey v. New York Cent. Ins. Co.*, 30 Hun (N. Y.), 299; 100 N. Y. 417; 53 Am. Rep. 202.

<sup>103</sup> *State Ins. Co. v. Maackens*, 33 N. J. L. 564.

<sup>104</sup> "It is an accepted canon of interpretation that if there is any uncertainty as to whether given words were used in an enlarged or restricted sense, that construction should be adopted which is most beneficial to the covenantee": *Paul v. Travelers' Ins. Co.*, 112 N. Y. 472, 479; 8 Am. St. Rep. 758, 762; *Kratzenstein v. Western Assur. Co.*, 116 N. Y. 54; *Foot v. Aetna F. Ins. Co.*, 61 N. Y. 571; *Getman*

tual benefit societies,<sup>105</sup> and since indemnity is the ultimate object of insurance,<sup>106</sup> the construction should also be in favor of indemnity and likewise for the benefit of trade,<sup>107</sup> for in case of doubtful construction insurance is held to be a contract *uberrimae fidei*.<sup>108</sup> So it is held that policies of insurance create reciprocal rights and obligations which require the utmost good faith in both parties,<sup>109</sup> and "the strictum jus or apex juris is not to be laid hold on."<sup>110</sup> The fact that contracts were drawn up generally in a loose and inartificial manner gave a

*v. Guardian F. Ins. Co.*, 46 Ill. App. 489. See, also, *Germania F. Ins. Co. v. Deckhard*, 3 Ind. App. 361; 28 N. E. Rep. 868; *Doe v. Dixon*, 9 East, 15; *Franklin F. Ins. Co. v. Brock*, 57 Pa. St. 74; *Marvin v. Stone*, 2 Cow. (N. Y.) 781, 806; *Teutonia F. Ins. Co. v. Mund*, 102 Pa. St. 89; *Elliott v. Hamilton Ins. Co.*, 13 Gray (Mass.), 139; *Northwestern M. L. Ins. Co. v. Hazelett*, 105 Ind. 212; 55 Am. Rep. 192; *De Graff v. Queen Ins. Co.*, 38 Minn. 501; *Monator v. American L. Ins. Co.*, 111 U. S. 335; *Western etc. Lines v. Home Ins. Co.*, 145 Pa. St. 346; 27 Am. St. Rep. 703; 22 Atl. Rep. 665; 21 Ins. L. J. 24; 48 Leg. Intell. 440; *Pettit v. State Ins. Co.*, 41 Minn. 299; 43 N. W. Rep. 378; *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 339; *Wells, Fargo Co. v. Pacific Ins. Co.*, 44 Cal. 397; *Healey v. Mutual Acc. Assn.*, 133 Ill. 556, 561; 23 Am. St. Rep. 637, 638, *Grant v. Lexington F. L. & M. Ins. Co.*, 5 Ind. 23; 61 Am. Dec. 74; *Alabama etc. Ins. Co. v. Johnson*, 80 Ala. 467; 2 S. Rep. 128, per the Court; 60 Am. Rep. 112; *Rocker v. Great Western Ins. Co.*, 4 Abb. App. Dec. 76; *Hood v. Manhattan F. Ins. Co.*, 11 N. Y. (1 Kern.) 532, per Parker, J.; *McGlinchy v. Fidelity etc. Co.*, 80 Me. 251.

<sup>105</sup> *Supreme Lodge v. Abbott*, 82 Ind. 1. 6.

<sup>106</sup> *Manger v. Holyoke F. Ins. Co.*, 1 Holmes (C. C.), 287.

<sup>107</sup> *Dow v. Hope Ins. Co.*, 1 Hall (N. Y.), 166, 174; *Bond v. Gonzales*, 2 Salk. 445, per Lee, C. J.; *Pelly v. Royal Exch. Assur. Co.*, 1 Burr. 341, 349; *Grandin v. Rochester Ins. Co.*, 107 Pa. St. 26; *McCluer v. Girard etc. Ins. Co.*, 43 Iowa, 349; 22 Am. Rep. 249; *Teutonia Ins. Co. v. Mund*, 102 Pa. St. 89; *Phoenix Ins. Co. v. Barnd*, 16 Neb. 89; *Miller v. Insurance Co.*, 12 W. Va. 116; 29 Am. Rep. 452; *Schroeder v. Trade Ins. Co.*, 109 Ill. 157; *Brink v. Merchants' etc. Ins. Co.*, 49 Vt. 442.

<sup>108</sup> *Goram v. Sweeting*, 2 Saund. 200, note; *Wolf v. Horncastle*, 1 Bos. & P. 316, 322. "Iste contractus assecurationi est bonæ fidei . . . et practicandus non est cum juris apicibus et rigoribus": *Emerigon on Insurance*, Meredith's ed. 1850, c. i, sec. 5, p. 17, citing *Casaregis*, disc. 1, n. 2.

<sup>109</sup> *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, 375; 41 Am. Dec. 592.

<sup>110</sup> *Pelly v. Royal Exch. Assur. Co.*, 1 Burr. 341, 349, per Lord Mansfield; adopting opinion of Lee, C. J.

reason for the rule that policies are to be construed liberally.<sup>111</sup> It was early stated, however, by Emerigon, in considering whether the contract was one *stricti juris* or *bonae fidei*,<sup>112</sup> that "so far as the nature of the contract will allow, the chance of the insurer and of the insured must be the same," and the courts frequently show a disposition to somewhat modify the rule of liberal construction,<sup>113</sup> and to do in these contracts, as in others, equal justice between the parties as far as the nature of the contract renders it possible.<sup>114</sup> There are numerous cases, however, where a rule which contemplates less than a liberal construction in favor of the insured and of indemnity would result in gross injustice to the insured.<sup>115</sup>

**§ 222. Same Subject—The Rule Contra Proferentem.**

It is a settled rule of construction that in cases of doubt policies of assurance shall be construed strictly against the insurer in accordance with the rule "*verba fortius accipiuntur contra proferentem*." So of two interpretations equally reasonable that construction most favorable to the assured must be adopted, for

<sup>111</sup> "Policies of insurance are generally drawn up in loose and in-artificial language, and indeed in the language of common life, and therefore are always construed liberally": *Palmer v. Warren Ins. Co.*, 1 Story (C. C.), 360, 365.

<sup>112</sup> Emerigon on Insurance, Meredith's ed. 1850, c. 1, sec. 5, p. 18.

<sup>113</sup> See sec. 221, herein.

<sup>114</sup> *Insurance Co. v. Slaughter*, 12 Wall. (U. S.) 404; *Merchants' Ins. Co. v. Davenport*, 17 Gratt. (Va.) 138. "We should, however, have great doubts whether this rule of liberal construction has been invariably followed. It has certainly been modified and restrained in recent cases by a disposition to treat these contracts like all other contracts, in such a way as shall do equal justice to all interested": 1 *Parsons on Marine Insurance*, ed. 1868, 67, 68, citing several cases criticising Mr. Duer's statement (1 *Duer on Insurance*, ed. 1845, 212) that a liberal construction had been invariably followed.

<sup>115</sup> See sec. 248, herein; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, 507; 17 Jur. 995; 24 Eng. L. & E. 1, per Lord St. Leonards. "Many early adjudications may be found, and not a few recent ones also, in which contracts of insurance, and especially of life insurance, have been construed in such a manner as to operate with great harshness and injustice to policy holders": *Alabama etc. Ins. Co. v. Johnson*, 80 Ala. 467; 60 Am. Rep. 112; 2 S. Rep. 128. And see remarks on this point in *Bacon's Benefit Societies and Life Insurance*, 1st ed., sec. 192.



the language is that of the insurers,<sup>116</sup> and if the terms of the policy are such that reasonable and intelligent men would honestly differ as to its meaning, it will be construed against the insurer;<sup>117</sup> and this is so of equivocal expressions which would narrow the range of the insurer's obligations,<sup>118</sup> and the rule applies to clauses restrictive of the company's liability in an accident policy,<sup>119</sup> and to exceptions,<sup>120</sup> and to conditions and provisions which would narrow the range and limit the force of the principal obligation or lessen the indemnity.<sup>121</sup> And where a clause in a policy of reinsurance provided: "This insurance to be on the excess which the T. Insurance Company may have on all their policies on cotton, sugar, and molasses and cotton seed, issued at their office in New Orleans, or at their Shreveport agency, as follows, viz., on the excess of ten thousand dollars on boats from places on the Mississippi river, but said excess not to exceed five thousand dollars by any one

<sup>116</sup> *Western etc. Co. v. Cropper*, 32 Pa. St. 351; 75 Am. Dec. 561; *Travelers' Pref. Acc. Ins. v. Kelsey*, 46 Ill. App. 371; *Olson v. St. Paul F. & M. Ins. Co.*, 35 Minn. 432; 29 N. W. Rep. 125; *Montgomery v. Firemen's Ins. Co.*, 16 B. Mon. (Ky.) 427; *Paul v. Travelers' Ins. Co.*, 112 N. Y. 479; 8 Am. St. Rep. 758, 762; *Wilson v. Conway F. Ins. Co.*, 4 R. I. 141; *Teutonia Ins. Co. v. Boylston Mut. Ins. Co.*, 20 Fed. Rep. 148; *Allen v. Insurance Co.*, 85 N. Y. 473; *Catlin v. Springfield Ins. Co.*, 1 Sum. (C. C.) 440; *Alemannia F. Ins. Co. v. Pittsburg Exp. Soc.*, 11 Atl. Rep. 572; 4 Pa. (L. ed.) 718; 10 Cent. Rep. 292; *Brink v. Merchants' Ins. Co.*, 49 Vt. 442; *White v. Smith*, 33 Pa. St. 186; 75 Am. Dec. 589; *Chandler v. St. Paul etc. Ins. Co.*, 21 Minn. 85; 18 Am. Rep. 385; *American Cent. Ins. Co. v. Rothchild*, 82 Ill. 166; *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605; *Bartlett v. Insurance Co.*, 46 Me. 500; *Insurance Co. v. Slaughter*, 12 Wall. (U. S.) 404; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 337; *Foot v. Aetna L. Ins. Co.*, 61 N. Y. 575; *Philadelphia Tool Co. v. British American Assur. Co.*, 132 Pa. St. 236; 19 Am. St. Rep. 596; 25 Week. Not. Cas. 370; *Wallace v. German Ins. Co.*, 41 Fed. Rep. 742; *Darrow v. Family F. Soc.*, 116 N. Y. 537; 27 N. Y. 474; 15 Am. St. Rep. 430; 6 L. R. Annot. 495; 22 N. E. Rep. 1093; *Fowkes v. Insurance Co.*, 3 Best & S. 917.

<sup>117</sup> *Kratzenstein v. Western Assur. Co.*, 116 N. Y. 54; 26 N. Y. 453, 456; 5 L. R. Annot. 799; 22 N. E. Rep. 221.

<sup>118</sup> *Commercial Ins. Co. v. Robinson*, 64 Ill. 265; 16 Am. Rep. 557.

<sup>119</sup> *United States Mut. Acc. Assn. v. Newman*, 84 Va. 52; 3 S. E. Rep. 805.

<sup>120</sup> *Grant v. Lexington etc. Ins. Co.*, 5 Ind. 23; 61 Am. Dec. 74.

<sup>121</sup> *Hoffman v. Aetna F. Ins. Co.*, 32 N. Y. 405; 88 Am. Dec. 337; *Anrora F. Ins. Co. v. Eddy*, 49 Ill. 106.

boat," it was decided that the words "on boats" indicated that more than the freight was included.<sup>122</sup> So the clause in a policy requiring notice of loss and a particular account of the same will be construed liberally against the insurer.<sup>123</sup> But it is said by Lord Bacon<sup>124</sup> that "this rule contra proferentem is the last to be resorted to, and is never to be relied upon, but where all other rules of exposition fail"; and it is held in a New York case<sup>125</sup> that the rule that an insurance contract is to be construed most strongly against the insurer is to be resorted to only where the language or some of the terms of the contract remain of doubtful import after the use of such other helps in construction as are proper. Story, J., recognizes the rule in *Palmer v. Warren Insurance Company*,<sup>126</sup> where he holds that a clause in the nature of an exception, if supposed to be ambiguous, must be construed most strongly against the insurer. So Lord Lyndhurst, in *Blackett v. Royal Exchange Assurance Company*<sup>127</sup> says: "The rule of construction as to exceptions is that they are to be taken most strongly against the party for whose benefit they are introduced. The words in which they are expressed are considered as his words; and if he do not use words clearly to express his meaning, he is the person who ought to be the sufferer." Mr. Duer<sup>128</sup> distinguishes in the application of this rule between words introduced "for the benefit of the insurers" and the "words of the insurer," and says: "If the words of a clause are to be construed strictly against the party for whose benefit it is introduced, the main provisions of the policy must be construed strictly against the assured . . . and his indemnity reduced to the narrowest possible limits."<sup>129</sup> In another case, Story, J.,<sup>130</sup> speaks of this rule as "a mere technical rule of construction." But that

<sup>122</sup> *Teutonia Ins. Co. v. Boylston Mut. Ins. Co.*, 20 Fed. Rep. 148.

<sup>123</sup> *McLaughlin v. Washington Co. Mut. Ins. Co.*, 23 Wend. (N. Y.) 524; *Barker v. Phoenix Ins. Co.*, 8 Johns. (N. Y.) 307; 5 Am. Dec. 339.

<sup>124</sup> Bacon's Max. Reg. 3.

<sup>125</sup> *Foot v. Aetna L. Ins. Co.*, 61 N. Y. 571.

<sup>126</sup> 1 Story (C. C.), 390.

<sup>127</sup> 2 Crompt. & J. 244, 250.

<sup>128</sup> 1 Duer on Insurance, ed. 1845, 214. See, also, *Id.* 209-11.

<sup>129</sup> *Citing Yeaton v. Fry*, 5 Cranch (U. S.), 335.

<sup>130</sup> *Donnell v. Columbla Ins. Co.*, 2 Sum. (C. C.) 381.

this expression should be regarded as obiter accords clearly with the opinion of Mr. Duer.<sup>131</sup> Mr. Parsons<sup>132</sup> thinks that the rule *contra proferentem* has been "pressed quite too far in favor of the insured," since insurance contracts are the result of negotiations and an agreement, and that "it is difficult to see how the words can be regarded as any more the words of the insurer than of the assured." Considered from a strictly legal standpoint this is true, for the contract of insurance, when consummated, is supposed to be one upon the terms of which the minds of the parties have met or concurred, and the insured is on general principles presumed to know the contents of a policy which he has accepted, and should therefore be bound by its terms.<sup>133</sup> But an examination of the cases discovers that the rule of construction against the insured obtains, because the applications and policies are framed by insurers in their interest, and the insured is in a measure bound to accept them. The terms of these contracts are seldom, if ever, the result of negotiations in the same sense that other contracts are. Very strong terms have been used at various times against the practice of many insurance companies to issue applications and policies which "are illegible and unintelligible to the generality of mankind,"<sup>134</sup> and the abuses which have arisen in consequence and the injustice resulting to the insured have been the occasion for legislative interposition in many states, and a rule of liberal interpretation in favor of indemnity and the assured and against the insurer has been followed as far as possible. Thus it is said by the court in *Brink v. Merchants' Insurance Company*<sup>135</sup> that "it is a fundamental rule in the law of insurance that the policy shall be construed most strongly against the insurer and liberally in favor of the

<sup>131</sup> 1 Duer on Insurance, ed. 1845, 214.

<sup>132</sup> 1 Parsons on Insurance, ed. 1868, 60, et seq.

<sup>133</sup> *Herbst v. Lowe*, 65 Wis. 321; 28 N. W. Rep. 751; *Moore v. State Ins. Co.*, 72 Iowa, 414; 34 N. W. Rep. 183; *Brown v. Insurance Co.*, 59 N. H. 298; *Morrison v. Phelps, etc.*, 44 Wis. 410; *Hawkins v. Rockfort Ins. Co.*, 70 Wis. 1; 35 N. W. Rep. 34, per Cassody, J.

<sup>134</sup> *De Lancey v. Rockingham Mut. F. Ins. Co.*, 52 N. H. 581, per Doe, C. J.

<sup>135</sup> 49 Vt. 457.

insured. . . . They use their own language, and surround and barricade their liability under it with such defenses as they choose to adopt. . . . There is obvious reason for the rule of liberal construction in favor of the man whose legal rights are to be extracted from such a labyrinth of mysticism." And in an Iowa case<sup>136</sup> the court declares: "It is quite time that the technical constructions which have pertained, with reference to contracts of this kind blocking the pathway to justice and leading to decisions opposed to the general sense of mankind, should be abandoned." To the same effect, although expressed in much stronger terms, are the words of Doe, C. J., in *Rockingham v. Mutual Fire Insurance Company*,<sup>137</sup> who refers to the policies prepared by the companies and to the numerous conditions against forfeiture, and says: "These provisions were of such bulk and character that they would not be understood by men in general, even if subjected to a careful and laborious study."<sup>138</sup> So in the case of warranties, which we shall consider hereafter,<sup>139</sup> the courts will not favor them by construction;<sup>140</sup> and in this connection it is said by the court in another case<sup>141</sup> that "the rapid growth of the business of life insurance in the past quarter of a century, with the tendency of insurers to exact increasingly rigid and technical constructions, and the evils resulting from an abuse of the whole system, justify, if they do not necessitate, a departure from the rigidity of our earlier jurisprudence on this subject of warranties." And in the same case the court also declares that "all the conditions of the contract and the obligations imposed" will be construed "liberally in favor of the assured and against the insurer."

**§ 223. The Written Controls the Printed Part of Policy.**—Insurance policies are reduced to a printed form,

<sup>136</sup> *Miller v. Mutual B. L. Ins. Co.*, 31 Iowa, 226; 7 Am. Rep. 122.

<sup>137</sup> 52 N. H. 581, 587.

<sup>138</sup> And see, also, *Hausal v. Minnesota etc Assn.*, 31 Minn. 17, 21; 47 Am. Rep. 776.

<sup>139</sup> See c. 45, herein.

<sup>140</sup> *Vivar v. Supreme Lodge*, 52 N. J. L. 455; 20 Atl. Rep. 36.

<sup>141</sup> *Alabama etc. Ins. Co. v. Johnson*, 80 Ala. 467, 472; 60 Am. Rep. 112; 2 S. Rep. 128.

conforming to a prescribed formula, since many, if not most, of the clauses have obtained a settled judicial construction,<sup>142</sup> and because they embrace general provisions applicable not only to one case, but to most cases of a certain class, and these printed forms contain blanks in which may be written such covenants and specific provisions as are agreed upon, which are consistent with the nature of the contract and the principles which govern it.<sup>143</sup> These specific written agreements become, therefore, the immediate and chosen language of the parties themselves,<sup>144</sup> and for this reason it is said that they are to be more strictly construed than the printed ones.<sup>145</sup> These written clauses should be construed together with the printed ones, and reconciled with them, if possible, in case of apparent contradiction, so as to give effect to every part of the contract;<sup>146</sup> and if there is no contradiction between the two, the printed clauses will be given the full effect of their terms.<sup>147</sup> But if the printed and written clauses are repugnant to each other, and cannot be reconciled, then inasmuch as the parties have

<sup>142</sup> The greater part of the printed language of policies of assurance, being invariable and uniform, has acquired from use and practice a known and definite meaning: *Robertson v. French*, 4 East, 136, per Lord Ellenborough.

<sup>143</sup> *Harper v. New York City Ins. Co.*, 22 N. Y. 441, per Selden, J. "In most maritime places they have printed forms of policies of insurance, in the blanks of which are written the special covenants on which the parties choose to agree": *Emerigon on Insurance*, Meredith's ed. 32, c. II, sec. 3; 1 *Duer on Insurance*, ed. 1845, 64, secs. 6, 7. "The printed words are a general formula, adapted equally to their case and that of all other contracting parties upon similar occasions and subjects": *Robertson v. French*, 4 East, 136, per Lord Ellenborough.

<sup>144</sup> "The written words are the immediate language and terms selected by the parties themselves for the expression of their meaning": *Robertson v. French*, 4 East, 136, per Lord Ellenborough.

<sup>145</sup> 1 *Arnould on Insurance*, Perkins' ed., 81, sec. 47, rule vi.

<sup>146</sup> *Golcochea v. Louisiana Ins. Co.*, 6 Mart. N. S. (La.) 51; 17 Am. Dec. 175; *Stokes v. Cox*, 1 Hurl. & N. 533; *Goss v. Citizens' Ins. Co.*, 18 La. Ann. 97, 101; 2 *Parsons on Contracts*, 5th ed., 516; *Howes v. Union Ins. Co.*, 16 La. Ann. 235.

<sup>147</sup> "But where there is no contradiction between the two (written and printed clauses), the printed clauses must stand and have the full effect of their terms, because they have been adopted by the parties": *Emerigon on Insurance*, Meredith's ed., 33, c. II, sec. 3. See *Mumford v. Hallett*, 1 Johns. (N. Y.) 433.

stipulated in writing, this express adoption of a chosen form of words to convey their meaning will control, and upon the point that the written clauses will be given effect over the printed ones, the decisions are unanimous.<sup>148</sup>

§ 224. *Same Subject—Cases.*—A special indorsement exempting from liability for partial loss controls,<sup>149</sup> but where the language of the printed form provided that the policy should be controlled by indorsements of special risks, and the written part omitted the word "carriage" contained in the printed part, such omission was held not to limit the policy.<sup>150</sup> Where the terms of limitation and description of the risk are written in, such clauses will control printed clauses which should have been stricken out, but which are left in, according to the usual custom.<sup>151</sup> And the phrase "against actual total loss only," written across the margin of a policy, will control the printed language therein.<sup>152</sup> So a written memorandum as to the manner of settling losses controls.<sup>153</sup> So where the risk assumed by the written

<sup>148</sup> "It is permitted to derogate from the printed clauses, and one is judged to derogate from them from the fact alone that the written clauses are repugnant to them": Emerigon on Insurance, Meredith's ed., 33, c. II, sec. 3; *Minnock v. Eureka F. & M. Ins. Co.*, 90 Mich. 236; 51 N. W. Rep. 367; *Harper v. Albany Mut. F. Ins. Co.*, 17 N. Y. 194; *Russel v. Manufacturers' etc. Assn.*, 50 Minn. 409; 52 N. W. Rep. 906; *Benedict v. Ocean F. Ins. Co.*, 31 N. Y. 389; *Robertson v. French*, 4 East, 130; 3 Kent's Commentaries, 6th ed., 26; *Golcoechea v. Louisiana State Ins. Co.*, 18 Mart. (La.) 51, 55; 17 Am. Dec. 175, per Porter, J.; *Frederick Co. Mut. Ins. Co. v. Deford*, 38 Md. 404; *Gunther v. London etc. Ins. Co.*, 34 Fed. Rep. 501; *Bargett v. Orient Mut. Ins. Co.*, 3 Bosw. (N. Y.) 385; *Shertzer v. Mutual F. Ins. Co.*, 46 Md. 506; *Niagara Ins. Co. v. De Graff*, 12 Mich. 124; *Archer v. Merchants' etc. Ins. Co.*, 43 Mo. 434; *Coster v. Phoenix Ins. Co.*, 2 Wash. (C. C.) 51; *Bill v. Hobson*, 16 East, 240; *Nielson v. Commercial Ins. Co.*, 3 Duer (N. Y.), 455; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Reynolds v. Commerce Ins. Co.*, 47 N. Y. 597; *Hernandez v. Sun etc. Ins. Co.*, 6 Blatchf. (C. C.) 317; *Plinsky v. Germania Ins. Co.*, 32 Fed. Rep. 47.

<sup>149</sup> *Chadsey v. Gulon*, 97 N. Y. 333.

<sup>150</sup> *Kratzenstein v. Western Assur. Co.*, 116 N. Y. 54; reversing 21 Jones & S. (53 N. Y. Sup. Ct.), 505.

<sup>151</sup> *Dudgeon v. Pembroke*, 2 L. R. App. C. 284.

<sup>152</sup> *Burt v. Brewers' etc. Ins. Co.*, 9 Hun (16 N. Y. Supr. Ct.), 383.

<sup>153</sup> *Hugg v. Augusta Ins. etc. Co.*, Taney (C. C.), 159.

agreement is irreconcilable with the printed terms, the former governs.<sup>154</sup> And the written words "port risk in the port of New York" control the printed part, and limit and define the risk.<sup>155</sup> And the insurance will not be limited to the interest of the insured, a carrier, where other and written parts discover a contrary intention.<sup>156</sup> Other cases illustrating this proposition are noted elsewhere.<sup>157</sup>

§ 225. **Construction—Lex Loci Contractus.**—Although there are conflicting decisions, yet the general rule is that contracts of insurance are governed, in matters of construction affecting their validity and the rights of the parties, by the law and usages of the place where the contract is made,<sup>158</sup> unless it appears that the parties had the law of another place in contemplation. The place where the contract is made is that where the final act is performed which is necessary to its completion and to make it binding upon both parties, for if anything remains to be and is done in another state to give validity to the policy, that state is the place of contract.<sup>159</sup> Other

<sup>154</sup> Nicolet v. Insurance Co., 3 La. 366; 23 Am. Dec. 458.

<sup>155</sup> Nelson v. Sun Mut. Ins. Co., 71 N. Y. 453.

<sup>156</sup> Fire Ins. Assn. v. Miners' Transp. Co., 66 Md. 339; 7 Atl. Rep. 905.

<sup>157</sup> See cases under sec. 223. See chapters 45, 49, 50, 53, 58, herein.

<sup>158</sup> But see Griswold v. Union etc. Ins. Co., 3 Blatchf. (C. C.) 231.

<sup>159</sup> Ford v. Buckeye State Ins. Co., 6 Bush (Ky.), 133; 99 Am. Dec. 663; Cox v. United States, 6 Pet. (U. S.) 172; Heebner v. Eagle Ins. Co., 10 Gray (Mass.), 131; Northampton etc. Co. v. Tuttle, 40 N. J. L. 476; Equitable L. Assur. Soc. v. Clements, 140 U. S. 226; Burchard v. Dunbar, 82 Ill. 450; 25 Am. Rep. 334. See Bliss on Life Insurance, ed. 1872, secs. 370-73; 1 Parsons on Insurance, ed. 1868, 132-35; 1 Duer on Insurance, ed. 1845, 262; Western v. Genesee Mut. Ins. Co., 12 N. Y. (2 Kern.) 258; Kennebec v. Augusta Ins. Co., 6 Gray (Mass.), 208; Northwestern Mut. L. Ins. Co. v. Elliott, 7 Saw. (C. C.) 17; 5 Fed. Rep. 225; Pomerooy v. Manhattan L. Ins. Co., 40 Ill. 398. "For that which is of the substance of the decision reference must be had, as a general rule, to the laws of the place where the contract was made. *Ex consuetudine ejus regionis in qua negotium gestum est*": Emerigon on Insurance, Meredith's ed. 1850, 98: "A foreigner who contracts within the territory of any state is bound as a subject, for the time being, of that state to submit himself to the laws of the country, . . . and reciprocally he is entitled to invoke the laws and privileges of this same country in the matter of any contracts he may have entered

cases hold, however, that generally the rights of parties are governed by the laws of the place where the contract is to be performed, and not where made, since it will be presumed that the contract was entered into with reference to the laws of the latter.<sup>160</sup> Unless there is something "in the circumstances to show that the parties had specially in view the law of the place where the contract is made, this law will govern, although the contract is to be performed elsewhere."<sup>161</sup> It has also been held that the legal construction and effect of a policy of insurance made by a company incorporated in a sister state are governed by the law of that state,<sup>162</sup> and that the law of the place where a mutual benefit association is formed and does business determines the liability of members.<sup>163</sup> So it is held in a recent mutual benefit association case that the contract is governed by the statutes of the state of the domicile of the corporation.<sup>164</sup> And it is also held that the contracts of a corporation, though made without the state by which it was created, are controlled by the laws of the state in which created.<sup>165</sup>

into there. It is the same with insurances made in France, for account of a foreigner, for everything connected with the decision of the substantial right of the case depends on the laws of the place of the contract. . . . But for decision of the substance of the cause, recourse must be had to the laws of the place of contract": *Id.* 101. See note, 99 Am. Dec. 671; Bacon's Benefit Societies and Life Insurance, ed. 1888, sec. 175; Richards on Insurance, ed. 1892, p. 54, sec. 44; 1 May on Insurance, Parsons' ed., secs. 66, 66 a. "The law of the country where the contract arose must govern the contract": *Male v. Roberts*, 3 Esp. 163, per Lord Eldon. "The law of the place where the contract is made is to govern as to the nature, validity, and construction of such contract": *Reimsdyk v. Kane*, 1 Gall. (C. C.) 374, per Story, J. "A contract must be governed by the law of the country where it is made": *May on Insurance*, Parsons' ed., 66 a.

<sup>160</sup> *Hyde v. Goodnow*, 3 N. Y. (3 Comst.) 266, per the Court.

<sup>161</sup> *Ruse v. Mutual B. L. Ins. Co.*, 26 Barb. (N. Y.) 556; 23 N. Y. 521; 24 N. Y. 653. See same case, 8 Ga. 534.

<sup>162</sup> *St. John v. American Mut. L. Ins. Co.*, 2 Duer (N. Y.), 419; 13 N. Y. 31; 64 Am. Dec. 529.

<sup>163</sup> *Cutler v. Thomas*, 25 Vt. 73. See *Knights of Honor v. Nairn*, 60 Mich. 44; 26 N. W. Rep. 826.

<sup>164</sup> *In re Globe Mut. B. Assn.*, 63 Hun (N. Y.), 264; 43 N. Y. 756; 17 N. Y. Supp. 852.

<sup>165</sup> *Fidelity Mut. L. Assn. v. Ficklin*, 74 Md. 172; 20 Ins. L. J. 534; 21 Atl. Rep. 680.



§ 226. **Same Subject—Cases.**—A statute <sup>166</sup> providing that the omission to attach to or indorse upon an insurance policy “a true copy” of the application of the assured shall preclude the insurance company from afterward relying thereon, applies to a foreign corporation insuring property situated in the state, though the contract of insurance is made without the state.<sup>167</sup> And a policy issued within the state by the agent of a foreign insurance company, not naming the place of payment of loss, is payable within the state.<sup>168</sup> The contract is governed also by the laws of the state where the agent having the power to make the contract acts.<sup>169</sup> So where an insurance company, organized under the laws of Vermont, was transacting business in the state of New York, and had a general agent in the city of New York, to whom a person acting as agent for a resident of New Jersey made application for insurance, and a policy was issued in pursuance of such application by the general agent in New York, it was held that the contract was executed in New York and subject to the laws of that state as to forfeiture for nonpayment of premiums.<sup>170</sup> But it is not necessary that a foreign insurance company issuing policies, duly signed by their president and secretary and accepted by the insured in the state of Massachusetts, where the premium note is given, should have a general agent within that state, in compliance with its general statutes, in order to have the policy interpreted according to the laws of that state.<sup>171</sup> So the Massachusetts statute relating to the forfeiture of life policies applies to foreign insurance companies doing business in Massachusetts, without regard to the question whether the contract of insurance is made there or in the state where the company is incorporated.<sup>172</sup> It is decided in a Michigan case that the

<sup>166</sup> Wis. Rev. Stat., sec. 1945 a.

<sup>167</sup> Stanhilber v. Mut. M. Ins. Co., 76 Wis. 285; 45 N. W. Rep. 221.

<sup>168</sup> Moshassuck etc. v. Blanding, 17 R. I. 95; 20 Ins. L. J. 475; 21 Atl. Rep. 538.

<sup>169</sup> Albion L. Ins. Co. v. Mills (App. Cas.), 3 Wils. & S. 218, 233.

<sup>170</sup> Hicks v. National L. Ins. Co. (U. S. C. C. A. 1894), 60 Fed. Rep. 690.

<sup>171</sup> Thwing v. Great Western Ins. Co., 111 Mass. 93.

<sup>172</sup> Holmes v. Charter Oak L. Ins. Co., 131 Mass. 64.

"circumstance that the liability to pay is made to depend" upon a risk upon real property here does not make the contract a Michigan contract, or in any legal sense make that "state the place of performance by the insurance company, and the further circumstance that the contractee was a Michigan corporation did not impress upon the contract the quality of locality so as to cause" the laws of Michigan, as to business done there by agents of foreign companies, to affect it in point of law.<sup>173</sup> So where the policy was issued and dated in Maine, the laws of that state were held to govern its construction, though the policy was sent to another state.<sup>174</sup> So where the secretary of an insurance company solicited and obtained the application of a resident of Nebraska, in which place the company was not authorized to transact business, and the application and the premium note were signed, the latter made payable at the home office, in Iowa, whence the policy issued, the contract was held to be governed by Iowa laws.<sup>175</sup> So policies executed in Ontario are Ontario contracts.<sup>176</sup> In another case where the contract was held to have been made in Glasgow, the agent there accepted the risk, and delivered the insured a memorandum stating the sum and the property insured, and promised that the policy would be made out in London and delivered to the insured or to his order.<sup>177</sup> So the law of the place where the premium note is made and given to the agent governs its construction;<sup>178</sup> and where the contract was to be performed in New Jersey, it was held that the statute of limitations operating as a bar there would control in another state,<sup>179</sup> and it is held that where a state law requires an agent to be appointed therein on whom process can be served, the contracts

<sup>173</sup> *Clay etc. Ins. Co. v. Huron S. Co.*, 31 Mich. 346.

<sup>174</sup> *Bailey v. Hope Ins. Co.*, 56 Me. 474.

<sup>175</sup> *Marden v. Hotel-Owners' Ins. Co.*, 85 Iowa, 584; 52 N. W. Rep. 500. See, also, *Eureka Ins. Co. v. Parks*, 1 Cin. S. C. R. 574; *Hyde v. Goodnow*, 3 N. Y. 286.

<sup>176</sup> *Clarke v. Union F. Ins. Co.*, 6 Ont. Rep. 223.

<sup>177</sup> *Pattison v. Mills*, 2 Bligh, N. S., 519; 1 Dow & C. 342.

<sup>178</sup> *Thornton v. Western Res. F. Ins. Co.*, 31 Pa. St. 529.

<sup>179</sup> *Spratley v. Mutual B. L. Ins. Co.*, 11 Bush (Ky.), 443; 7 Chd. Leg. News, 51.

made by the agent are to be governed by the law of the state where the agent acts.<sup>180</sup> An open policy of insurance containing all the conditions governing the shipment of such goods as are specially insured under the policy, and reserving to the insurer the right of accepting or rejecting each special subject of insurance, will, it is held, be considered as a contract made at the domicile of the company.<sup>181</sup>

§ 227. **Same Subject—Exceptions to the Rule.**—An exception to the rule that the contract of insurance is governed by the law of the place where made exists in case the usage of trade in one state affects the construction of a policy made in another,<sup>182</sup> So the question of seaworthiness is determined by the usage or custom of port where the vessel belongs, rather than that of the place where the contract is made,<sup>183</sup> and if the usages of such port are adopted by the policy, they control its construction;<sup>184</sup> but rights of parties under a contract of affreightment are governed by the law of the place where the contract is made, and not by that of the place of the ship's flag.<sup>185</sup>

§ 228. **Same Subject—Mutual Benefit Society.**—In case of mutual benefit societies it is held that the right to designate a beneficiary is governed by the law of the place of contract giving such power,<sup>186</sup> and in a recent case the application was made in Michigan, and the by-laws provided that it must be approved in Indiana, and that the membership fee should be paid before the contract became binding, and the certificate also provided that the contract should be considered made in

<sup>180</sup> *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614.

<sup>181</sup> *State v. Williams*, 46 La. Ann. 922; 15 S. Rep. 290; 23 Ins. L. J. 508.

<sup>182</sup> See 1 Duer on Insurance, ed. 1845, 262, 263.

<sup>183</sup> *The Titania*, 19 Fed. Rep. 101; *Tidmarsh v. Washington F. & M. Ins. Co.*, 4 Mason (C. C.), 442.

<sup>184</sup> *Union Bank v. Union Ins. Co.*, Dud. (S. C.) 171.

<sup>185</sup> *China Mut. Ins. Co. v. Force*, 142 N. Y. 90; 58 St. R. 400; 40 Am. St. Rep. 570, citing *Dyke v. Erie R. R. Co.*, 45 N. Y. 113; *Faulkner v. Hart*, 82 N. Y. 413.

<sup>186</sup> *American L. of H. v. Perry*, 140 Mass. 580; *Knights of Honor v. Nairn*, 60 Mich. 44.

Indiana, and should be governed by its laws, and it was held that the laws of that state controlled.<sup>187</sup>

**§ 229. When Place Where Policy is Countersigned is Place of Contract.**—Where the policy is not to be valid till countersigned by the agent, it will be construed according to the law of the place where such act is performed and the policy delivered,<sup>188</sup> although the policy is dated in another state and signed by the president and secretary there.<sup>189</sup> A Canadian insurance company with a branch office at Baltimore insured a resident of Washington, D. C. The policy provided that it was not to be valid until countersigned by the authorized agent at Washington, D. C. The agent there countersigned and delivered the policy, and it was signed by the agent at Baltimore, at which place it also purported to be dated and to be signed by two directors of the company and by the attorney, and to bear the company's seal. It was held that this was not a Maryland contract.<sup>190</sup>

**§ 230. When Place of Delivery is Place of Contract.** Although the contract is made and dated in one state, but is to be binding only on delivery, the laws of the state where the insured is a resident and where it is delivered to him, govern the contract.<sup>191</sup> And, as a general rule, the delivery of the policy to the insured in the state in

<sup>187</sup> Voorhees v. People's Mut. B. Soc., 91 Mich. 469; 51 N. W. Rep. 1109.

<sup>188</sup> In re Breitung's Estate, 78 Wis. 33; 46 N. W. Rep. 891; Curnon v. Phoenix Ins. Co., 37 S. C. 406; 34 Am. St. Rep. 766; 16 S. E. Rep. 132; Moore v. Charter Oak L. Ins. Co., 8 Ins. L. J. 78; Pomeroy v. Manhattan L. Ins. Co., 40 Ill. 398; Northwestern Mut. L. Ins. Co. v. Elliott, 9 Saw. (C. C.) 17; 5 Fed. Rep. 225. See Smith v. Mutual L. Ins. Co., 5 Fed. Rep. 582; Hardie v. St. Louis M. L. Ins. Co., 26 La. Ann. 242; St. Louis M. & L. Ins. Co. v. Kennedy, 6 Bush (Ky.), 455.

<sup>189</sup> Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 422; 59 Am. Dec. 192; Heebner v. Eagle Ins. Co., 10 Gray (Mass.), 131; 69 Am. Dec. 308.

<sup>190</sup> Cromwell v. Royal Canadian Ins. Co., 49 Md. 366; 33 Am. Rep. 258.

<sup>191</sup> Knights Templar etc. Co. v. Berry, 50 Fed. Rep. 511; Wall v. Equitable etc. Soc., 32 Fed. Rep. 273; Meagher v. Aetna Ins. Co., 20 U. C. Q. B. 607; Hyde v. Goodnow, 8 Comst. (N. Y.) 266.

which he resides, and the payment by him of his first premium in that state, renders the contract subject to the laws of such state.<sup>192</sup> And this is the rule where it is sent to the agent in another state to be there delivered on receipt of the premium.<sup>193</sup> Where by the express terms of the charter of an insurance company a contract of life insurance does not become binding until delivery to assured, and the application is made and the policy delivered to the resident agent of the company in Missouri, it is incepted and completed in that state, and is to be construed by the laws thereof, even though issued by a corporation in Illinois.<sup>194</sup> But where the agent in Edinburgh received a policy and delivered it there, and received the premium, the policy being executed in London, it was held that the laws of England governed.<sup>195</sup> So in another case the agent in Canada of an insurance company, incorporated in New York, received and forwarded to the secretary of the company in New York a proposal for insurance upon property in Canada, the proposal was accepted, and the deposit and premium note left with the secretary, who issued the policy and sent it to the agent in Canada, by whom it was delivered to the insured, and it was decided that it was a New York contract.<sup>196</sup>

**§ 231. When Place of Acceptance and Mailing is Place of Contract.**—The place of acceptance of the proposal for insurance may become the place of contract, by mailing from there such acceptance, and the law of that place will then govern the contract,<sup>197</sup> although it is held that where the

<sup>192</sup> *Equitable L. Assur. Soc. v. Winning*, 7 C. C. App. (U. S.) 359; 58 Fed. Rep. 541; 23 Ins. L. J. 81; *Reliance Mut. Ins. Co. v. Sawyer*, 160 Mass. 414; 36 N. E. Rep. 59.

<sup>193</sup> *Ford v. Buckeye State Ins. Co.*, 6 Bush (Ky.), 133; 99 Am. Dec. 663; *Thwing v. Great Western Ins. Co.*, 111 Mass. 93; *In re Breitung's Estate*, 78 Wis. 33; 46 N. W. Rep. 891.

<sup>194</sup> *Knights Templar etc. Co. v. Berry*, 1 C. C. A. (U. S.) 561; affirming 46 Fed. Rep. 439; *Mutual B. L. Ins. Co. v. Robinson*, 54 Fed. Rep. 580, 584; *Hicks v. National L. Ins. Co.*, 60 Fed. Rep. 690; 9 C. C. A. (U. S.) 215.

<sup>195</sup> *Parken v. Royal Exch. Assur. Co.*, 18 Scot. Jur. 147.

<sup>196</sup> *Western v. Genesee Mut. Ins. Co.*, 12 N. Y. (2 Kern.) 258.

<sup>197</sup> *Northampton Mut. L. Ins. Co. v. Tuttle*, 40 N. J. L. 476; *Giddings v. Insurance Co.*, 102 U. S. 108; *Ford v. Buckeye State Ins. Co.*,

application was accepted in New York and mailed to Missouri, the law of Missouri governed the contract.<sup>198</sup> But in another case it was held that a policy of insurance executed in New York by a New York corporation doing business in Missouri, upon an application signed in Missouri by a resident of Missouri, the application being made part of the contract, which declared that it should not take effect until the first premium should have been actually paid, etc., and which was delivered and the first premium paid in Missouri, was, in the absence of evidence of the company's acceptance of the application in New York, or of its transmission directly by mail to the insured, a Missouri contract, and governed by the laws of that state.<sup>199</sup>

§ 232. *Assignment Lex Loci Contractus.*—It is held that the validity of an assignment of a policy of insurance is governed by the place of contract;<sup>200</sup> but it is also decided that where a policy was issued under the laws of New York relating to insurances on lives for the benefit of married women, the contract being made in that state and assigned by the wife to secure her husband's debt, and the assignment was executed in New York and sent by mail to Maryland, to a creditor there, the validity of the assignment must be determined by the laws of New York, the action being brought there.<sup>201</sup>

6 Bush (Ky.), 133, 139; 90 Am. Dec. 663; *Commercial Ins. Co. v. Hallock*, 27 N. J. L. (3 Dutch.) 645; 72 Am. Dec. 379; *Hyde v. Goodnow*, 3 N. Y. 269; *Bailey v. Hope Ins. Co.*, 56 Me. 474.

<sup>198</sup> *Wall v. Equitable L. Assur. Co.*, 32 Fed. Rep. 273.

<sup>199</sup> *Equitable L. Ins. Soc. v. Clements*, 140 U. S. 226; 11 Sup. Rep. 822.

<sup>200</sup> *Pratt v. Globe Mut. L. Ins. Co.* (Tenn. 1891), 17 S. W. Rep. 352.

<sup>201</sup> *Barry v. Equitable L. Assur. Soc.*, 59 N. Y. 587.

## CHAPTER IX.

### CONSTRUCTION—USAGE.

- § 237. Usage generally.
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- § 256. Evidence of usage: Liberal construction.
- § 257. What is sufficient evidence of usage.
- § 258. Evidence of usage, when admissible: Cases.
- § 259. Evidence of usage, when inadmissible: Cases.

§ 237. Usage Generally.—Evidence of general usage was formerly admitted to determine the construction of policies of insurance for the reason that they were so loosely drawn, and because the contract depended so greatly upon commercial usage, and there were so few adjudications or rules of positive law to aid in its interpretation. So Lord Mansfield had recourse in a large measure to the usage of merchants and commercial law in ascertaining those principles which underlie his

decisions in cases of insurance, and which have now to so large an extent become of controlling force in the construction of insurance contracts.<sup>1</sup> Buller, J., in *Brough v. Whitmore*<sup>2</sup> says that insurance "is founded on usage, and must be governed and construed by usage," and Mr. Duer<sup>3</sup> asserts that the true purpose of a usage is "to discover in order to effectuate the intentions of the parties," and usage is received to ascertain the sense of the parties with reference to such usage.<sup>4</sup>

§ 238. **Usage Part of the Common Law.**—In England, where so few positive laws have been enacted, and where the first act concerning insurances was not passed until 1601,<sup>5</sup> the practice of insuring was dependent upon the common law, of which the law of merchants was considered a branch, and also upon the general principles and usages of trade.<sup>6</sup> It is declared in an English case<sup>7</sup> that "the custom of merchants or law of merchants is the law of the kingdom, and is part of the common law." These customs acquire the force of law, because as they must be ancient, uniform, and reasonable, they must have been generally received, known, and approved.<sup>8</sup>

<sup>1</sup> See sec. 1, preliminary chapter. Remarks of Lord Kenyon in *Brough v. Whitmore*, 4 Term Rep. 208, that Lombard St. had given a construction to policies of insurance, and that the practice of merchants and underwriters had rendered them intelligible.

<sup>2</sup> 4 Term Rep. 210.

<sup>3</sup> 1 Duer on Insurance, ed. 1845, 253.

<sup>4</sup> *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581, per the Court.

<sup>5</sup> 43 Eliz., c. 12.

<sup>6</sup> See sec. 1, preliminary chapter; 1 Marshall on Insurance, ed. 1810, 21.

<sup>7</sup> *Edie v. East India Co.*, 2 Burr. 1226.

<sup>8</sup> *McGregor v. Insurance Co.*, 1 Wash. (C. C.) 39, per Washington, J. See sec. 1, herein. "The whole business of insurance and all the instruments by which it is carried on, and all their language and provisions, rest on the usage of merchants; and nearly all the law of insurance is but the usage of merchants, adopted and sanctioned by courts": 1 Parsons on Marine Insurance, ed. 1868, 82. "With respect to usage, it is a sort of natural law formed out of our habits, our interests, and the universal consent of all mankind. In all maritime matters it is regarded as the surest interpreter of the law. . . . In questions of insurance established usages must in all cases be adhered to, and in doubtful cases they are the safest guide one can follow": 1 Marshall on Insurance, ed. 1810, 707 a.



§ 239. **Presumption as to Knowledge of Usage.**—Underwriters are bound to inform themselves and to know the general usages of the trade in which they insure,<sup>9</sup> for it is presumed that the custom of merchants is known to them,<sup>10</sup> and the insurer and insured must be supposed to be fully apprised and conusant of a notorious usage, as to a course of a voyage, and to know the nature and peculiar circumstances of that branch of trade to which the policy relates, and that whether it is recently established or not.<sup>11</sup> The insurers are also presumed to know the customs of the place where they do business, and are assumed in law to know them.<sup>12</sup> So they are presumed to be acquainted with the nature and peculiar circumstances of the branch of trade to which the risk relates.<sup>13</sup> So in a policy on a foreign vessel the underwriter must be taken to have knowledge of the common usages of trade in such country as to equipments of vessels of that class for the voyage on which she was destined.<sup>14</sup> Mr. Marshall<sup>15</sup> asserts that British underwriters cannot be presumed to be conusant of the usages of the particular trade undertaken by ships of foreign nations in foreign trade, but that the usage must have been made known to them to be binding.<sup>16</sup> Mr. Duer, however,<sup>17</sup> criticises this assertion as impolitic and un-

<sup>9</sup> *Noble v. Kennoway*, 2 Doug., pt. 2, 3d ed., 513, per Lord Mansfield; *Maryland & Phoenix Ins. Co. v. Bathurst*, 5 Gill & J. (Md.) 159; *Cox v. Charleston etc. Ins. Co.*, 3 Rich. (S. C.) 331; 45 Am. Dec. 771; *Vallance v. Dewar*, 1 Camp. 503; *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383; *Norris v. Insurance Co.*, 3 Yeates (Pa.), 84; 2 Am. Dec. 360; *Salvador v. Hopkins*, 3 Burr. 1707, 1712, 1714; 1 Duer on Insurance, ed. 1845, 196. See, generally, *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471; *First Nat. Bank v. Fiske*, 123 Pa. St. 241; 19 Am. St. Rep. 635.

<sup>10</sup> *McGregor v. Insurance Co.*, 1 Wash. (C. C.) 39, per Washington, J. See, generally, *Austrian v. Springer*, 34 Mich. 343; 34 Am. St. Rep. 350.

<sup>11</sup> *Salvador v. Hopkins*, 3 Burr. 1707, 1714; *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33.

<sup>12</sup> *Hartshorne v. Union etc. Ins. Co.*, 36 N. Y. 172.

<sup>13</sup> *Grant v. Lexington etc. Ins. Co.*, 5 Ind. 23; 61 Am. Dec. 74.

<sup>14</sup> *Tidmarsh v. Washington etc. Ins. Co.*, 4 Mason (C. C.), 442, per Story, J.

<sup>15</sup> 1 Marshall on Insurance, ed. 1810, 275.

<sup>16</sup> Citing *Larabie v. Wilson*, Doug. 271; digested, Id. 192, et seq.; also in 1 Duer on Insurance, ed. 1845, 243, et seq.

<sup>17</sup> 1 Duer on Insurance, ed. 1845, 199.

supported, but it is said by McLean, J., in *Hazard's Administrator v. New England Marine Insurance Company*,<sup>18</sup> that "the underwriters are presumed to know the usages of foreign ports to which insured vessels are destined, also the usages of trade and the political conditions of foreign nations." Where the usage is of such a character that the presumption exists that the insurer has knowledge thereof, the applicant is not bound to communicate such usage to him.<sup>19</sup> But usage in a particular place or of a particular class of persons cannot be binding on other persons unless they are acquainted with that usage and adopt it.<sup>20</sup>

**§ 240. Usage must be General.**—In order that a usage should be admitted in evidence in the construction of the terms of a policy, it must possess certain necessary properties or essentials, one of which is, that it should be general<sup>21</sup>—that is, general to the whole mercantile world,<sup>22</sup> or in regard to the

<sup>18</sup> 8 Pet. 582.

<sup>19</sup> *Cox v. Charleston etc. Ins. Co.*, 3 Rich. (S. C.) 331; 45 Am. Dec. 771; *Planche v. Fletcher*, 1 Doug. 251; *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416; 59 Am. Dec. 192; *Kingston v. Knibbs*, 1 Camp. 508, n., per Lord Ellenborough.

<sup>20</sup> *Bartlett v. Pentland*, 10 Barn. & C. 760, 770, per Lord Tenterden; *Wells v. Bailey*, 49 N. Y. 464; *Rogers v. Mechanics' Ins. Co.*, 1 Story (C. C.), 603; *Adams v. Otterback*, 15 How. (U. S.) 539; *Eyre v. Marine Ins. Co.*, 5 Watts & S. (Pa.) 116; *Herman v. West etc. Ins. Co.*, 7 La. (13 La., O. S., 516) 325; *Scott v. Irving*, 1 Barn. & Adol. 605; *Howard v. Great Western Ins. Co.*, 109 Mass. 384; *Taylor v. Ætna L. Ins. Co.*, 13 Gray (79 Mass.), 434; *Crosby v. Fitch*, 12 Conn. 422; 31 Am. Dec. 745; *Hartford Prot. Ins. Co. v. Harmer*, 2 Ohio St. 452; 59 Am. Dec. 684; *Gabay v. Lloyd*, 3 Barn. & C. 793; *Leach v. Perkins*, 17 Me. 462; 35 Am. Dec. 268; *Trott v. Wood*, 1 Gall. (C. C.) 443; *Stewart v. Aberdeen*, 4 Mees. & W. 211; *Lee v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 298; *Mason v. Franklin Ins. Co.*, 12 Gill & J. (Md.) 468. In general, if a custom is local, a person who resides in a foreign land, and has never been to the particular locality before, is not bound unless he has knowledge of the custom: *Horan v. Strachan*, 86 Ga. 408; 22 Am. St. Rep. 471.

<sup>21</sup> *Sturges v. Buckley*, 32 Conn. 20; *Leach v. Perkins*, 17 Me. 462; 35 Am. Dec. 268; *Crosby v. Fitch*, 12 Conn. 410; 31 Am. Dec. 745, 750, per Church, J.; *Missouri etc. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776; *Gabay v. Lloyd*, 3 Barn. & C. 793; *Trott v. Wood*, 1 Gall. (C. C.) 442, per Story, J., and see cases cited in last note.

<sup>22</sup> 1 Arnould on Marine Insurance, Perkins' ed. 1850, 71. See generally, on this point, *Southwestern F. & C. P. Co. v. Stanard*, 44 Mo. 71;

trade to which it has reference. Thus, a universal custom of a particular trade, which has been invariably or uniformly followed for many years, is admissible in evidence to determine the actual contract.<sup>23</sup> A usage cannot be said to be general which has obtained only in a few instances, for such a usage cannot be regarded,<sup>24</sup> nor can a usage be general which is known only to a few, for such limited knowledge does not establish a usage.<sup>25</sup> Mr. Duer<sup>26</sup> gives much consideration to the meaning of the word "general" in this connection,<sup>27</sup> and limits its application to those cases in which the knowledge of the parties and their intention to adopt the usage are inferred merely from the fact of its existence, but says that when their knowledge or intentions depend upon other direct or circumstantial evidence, their contract may be governed by usage, local or partial, as in case of usage between the parties or a local usage of trade practiced by the insurers.<sup>28</sup> It is said by Story, J., in *Rogers v. Mechanics' Insurance Company*<sup>29</sup> that "the usage or custom of a particular port in a particular trade is not such a custom as the law contemplates to limit or control or qualify the language of contracts of insurance. It must be some known general usage or custom in the trade, applicable and applied to all the ports of the state where it exists, and from its character and extent so notorious that all such con-

100 Am. Dec. 255; *Columbus etc. Ins. Co. v. Tucker*, 48 Ohio St. 41; 29 Am. St. Rep. 534, per Spear, J.

<sup>23</sup> See *Leach v. Perkins*, 17 Me. 462; 35 Am. Dec. 268; *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581; *Coggeshall v. American Ins. Co.*, 3 Wend. (N. Y.) 283; *Goodenow v. Tyler*, 7 Mass. 336; 5 Am. Dec. 22. In general, knowledge of a usage need not be shown by direct evidence, but may be inferred from circumstances or implied from its notoriety: *Barry v. Hannibal etc. Ry. Co.*, 98 Mo. 62; 14 Am. St. Rep. 610.

<sup>24</sup> *Cutter v. Powell*, 6 Term Rep. 324; *Crosby v. Fitch*, 12 Conn. 422; 31 Am. Dec. 745, 749.

<sup>25</sup> *Collings v. Hope*, 3 Wash. (C. C.) 149, 150, per Washington, J.

<sup>26</sup> 1 Duer on Insurance, ed. 1845, 258, et seq.

<sup>27</sup> "The word 'general,'" he says, "is used in various senses. It is used in reference to places as well as persons. In the first sense it is opposed to 'local,' in the second to 'partial.' In another sense it embraces the whole of the subjects to which it relates, and is opposed to 'special' or 'particular,'" etc.: 1 Duer on Insurance, ed. 1845, 259, sec. 55.

<sup>28</sup> 1 Duer on Insurance, ed. 1845, 263, sec. 55.

<sup>29</sup> 1 Story (C. C.), 607.

tracts of insurance in that trade must be presumed to be entered into by the parties in reference to it as a part of the policy." But a local or particular custom may be general in the sense that an insurance company, by a long-continued and invariable and known course of dealing, have established a binding usage.<sup>30</sup> So a usage at Lloyds may be general and binding upon those in the habit of underwriting there.<sup>31</sup>

**§ 241. Usage must be Well Established and Notorious.**

The usage should be well established; that is, so well settled that persons engaged in a trade must be considered as contracting in reference thereto,<sup>32</sup> and it must be so well known in general among those engaged in the business or trade to which it belongs as to be received as a matter of course.<sup>33</sup> If it be a particular usage, it must be "of universal notoriety in the trade in which, and of the place at which, the insurance is effected."<sup>34</sup>

**§ 242. Usage may be of Recent Origin.**—Although it is said that usage must be ancient,<sup>35</sup> public, and continued,<sup>36</sup>

<sup>30</sup> See *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.), 84; *Union Cent. L. Ins. Co. v. Pottker*, 33 Ohio St. 459; 31 Am. Rep. 555; *Helme v. Philadelphia L. Ins. Co.*, 61 Pa. St. 107; 100 Am. Dec. 621; *Baxter v. Massachusetts Ins. Co.*, 13 Allen (Mass.), 320.

<sup>31</sup> *Gabay v. Lloyd*, 3 Barn. & C. 793.

<sup>32</sup> *Trott v. Wood*, 1 Gall. (C. C.) 444, per Story, J.; *Cobb v. Lime Rock etc. Ins. Co.*, 58 Me. 328, per Appleton, C. J.; *Columbus etc. Ins. Co. v. Tucker*, 48 Ohio St. 41; 29 Am. St. Rep. 534, per Spear, J.; *Missouri etc. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776; *Southwestern F. & C. P. Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 255.

<sup>33</sup> *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 363, per Shaw, C. J.; *Winson v. Dellawney*, 4 Met. (Mass.) 221, 223, per Shaw, C. J.; *Rogers v. Mechanics' Ins. Co.*, 1 Story (C. C.), 603, 607, 608, per Story, J.; *McGregor v. Insurance Co.*, 1 Wash. (C. C.) 39, per Washington, J.; *Donnell v. Columbian Ins. Co.*, 2 Sum. (C. C.) 377, 378, per Story, J.; *Steele v. McTyer's Admr.*, 31 Ala. 667; 70 Am. Dec. 516, and note 523; *Palmer v. Blackburne*, 1 Bing. 61, per Dallas, J., and Burrough, J.; *Collings v. Hope*, 3 Wash. (C. C.) 149, 150, per Washington, J.; *Salvador v. Hopkins*, 3 Burr. 1707; *Power v. Whitmore*, 4 Mees. & S. 150; 1 *Duer on Insurance*, ed. 1845, 265.

<sup>34</sup> 1 *Arnould on Marine Insurance*, Perkins' ed. 1850, 71. And see cases in two preceding notes.

<sup>35</sup> *Collings v. Hope*, 3 Wash. (C. C.) 149. See *Commonwealth v. Mayloy*, 57 Pa. St. 291.

<sup>36</sup> See *Crosby v. Fitch*, 12 Conn. 422; 31 Am. Dec. 745; *Sipperly v. Steward*, 50 Barb. (N. Y.) 62.

and although it is held that a usage of short continuance is not entitled to any weight,<sup>37</sup> yet it is well settled that a usage may be of recent origin.<sup>38</sup> So in *Noble v. Kenneway*<sup>39</sup> a usage existing for three years was held sufficient, and Lord Mansfield declares in that case that "every underwriter is presumed to be acquainted with the practice of the trade he insures, whether recently established or not. If he does not know it, he ought to inform himself. It is no matter if the usage has been only for a year." So Mr. Arnould<sup>40</sup> says that where the trade is recent, it is only necessary that a usage be coextensive therewith, and be general and well known. In a Maine case the court<sup>41</sup> declares that a usage must be "certain, general, frequent, and so ancient as to be generally known and acted upon," while in a New York case<sup>42</sup> it is said that "the true test of a commercial usage is its having existed a sufficient length of time to have become generally known, or to warrant a presumption that contracts are made in reference to it."<sup>43</sup>

§ 243. **Usage must be Reasonable.**—A usage must be valid, reasonable, and not one which would by construction result in an absurdity, for it must be assumed that an unreasonable usage or one leading to an absurdity was not contemplated by the parties in effecting the contract.<sup>44</sup> It is held

<sup>37</sup> *Wall v. East River Ins. Co.*, 3 Duer (N. Y.), 264.

<sup>38</sup> *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 363, 364, per Hubbard, J., citing 2 Starkie on Evidence, 453. See *Townsend v. Whitby*, 5 Harr. (Del.) 55.

<sup>39</sup> Doug., 3d ed., pt. 2, 513. Cited also in *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 589.

<sup>40</sup> 1 Arnould on Insurance, Perkins' ed. 1850, 69, 70.

<sup>41</sup> *Leach v. Perkins*, 17 Me. 462; 35 Am. Dec. 268, per Shipley, J.

<sup>42</sup> *Smith v. Wright*, 1 Caines (N. Y.), 43. Usage in this case carried back by some witnesses as far as thirty years, and it was objected that period was too short.

<sup>43</sup> See *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 581, per Thompson, J. "No particular period is requisite to the establishment of a usage": 1 Phillips on Insurance, 2d ed., sec. 138. "It is quite certain that where a usage is recent or local, it may have sufficient force to affect the construction of the policy if brought home to the knowledge and recognition of the parties": 1 Parsons on Insurance, ed. 1868, 93.

<sup>44</sup> *Seccomb v. Provincial Ins. Co.*, 10 Allen (Mass.), 314, per Bigelow, C. J.; *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 363, per Shaw, J.; *Leach v. Perkins*, 17 Me. 462; 35 Am. Dec. 268; *Ougier v. Jennings*, 1 Camp. 505, note, Lord Eldon's charge to jury; *Collings v. Hope*, 3 Wash. (C. C.)

that a general and notorious custom of steamboat captains at large river ports to insure their boats and execute premium notes therefor is reasonable and valid as against the owners.<sup>45</sup> But a custom of a particular port to strike off one-third the gross freight for charges and to pay two-thirds only to the assured in a freight policy is unreasonable,<sup>46</sup> and a usage which would continue a time policy in force at the election of the insured for an unlimited time is unreasonable.<sup>47</sup> So a usage for a master to sell without necessity is invalid.<sup>48</sup> So a usage permitting an intermediate voyage may be unreasonable, as in a case where the policy gave "liberty of other port or ports," but was indorsed, "liberty is given to deviate by going to port or ports in Europe, by paying an equitable premium therefor."<sup>49</sup> A local custom that insurance agents may, after the termination of their agency, cancel any policies issued through them, is unreasonable and void.<sup>50</sup> It is said that a usage, to be enforced by law, "must be reasonable in its provisions, for though usages apparently unreasonable may have been so long continued as to have acquired the force of law, yet the unreasonableness now apparent may have grown out of changes occurring after the usage was established."<sup>51</sup>

149, 150, per Washington, J.; *Bryant v. Commonwealth Ins. Co.*, 6 Pick. (Mass.) 131. "Usage, to be valid, must be reasonable. It must not tend to increase extravagantly or indefinitely the risks that the underwriter meant to assure, or to deprive the assured of the whole or a large portion of the indemnity on which he certainly relied. It must not lead to consequences that could not have been contemplated by the parties, thus repelling the presumption that they meant to adopt it as the basis of their contract": 1 Duer on Insurance, ed. 1845, 268, sec. 63, lect. ii, p. 2. See *Jordan v. Meredith*, 3 Yeates (Pa.), 318; 2 Am. Dec. 373, and note; *Missouri etc. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776; *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141; 25 Am. Dec. 363; *Columbus etc. Ins. Co. v. Tucker*, 48 Ohio St. 41; 29 Am. St. Rep. 534, per Spear, J.; *Farnsworth v. Hemmer*, 1 Allen (Mass.), 494; 79 Am. Dec. 756, and note, 759; *Kendall v. Russell*, 5 Dana (Ky.), 501; 30 Am. Dec. 696, 698.

<sup>45</sup> *Adams v. Pittsburgh Ins. Co.*, 95 Pa. St. 348; 40 Am. Rep. 662.

<sup>46</sup> *McGregor v. Pennsylvania Ins. Co.*, 1 Wash. (C. C.) 39.

<sup>47</sup> *Eyre v. Marine Ins. Co.*, 5 Serg. & W. (Pa.) 116; 6 Whart. (Pa.) 247.

<sup>48</sup> *Bryant v. Commonwealth Ins. Co.*, 6 Pick. (Mass.) 131.

<sup>49</sup> *Secomb v. Provincial Ins. Co.*, 10 Allen (Mass.), 305.

<sup>50</sup> *Merchants' Ins. Co. v. Prince*, 50 Minn. 53; 52 N. W. Rep. 131.

<sup>51</sup> *Macy v. Whaling Ins. Co.*, 9 Met. (Mass.) 363, per Shaw, C. J. It

§ 244. **Usage must be Uniform.**—The course of trade or custom which constitutes a usage must be uniform in its practice during its continuance, whether the usage be recent in its origin or long established; that is, its practice must be regular, uninterrupted, and constant in its observance and settled, not indeterminate nor variable in its character;<sup>52</sup> for occasional instances, or its practice among a few only, will not establish a usage,<sup>53</sup> and as was said by Shaw, C. J., in *Macy v. Whaling Insurance Company*,<sup>54</sup> it must also be “convenient and adapted not only to increase facilities in trade, but to the promoting of just dealings in the intercourse between the parties.” It is said that “the course of trade must be uniform and general to enable it to be considered as a legal defense,”<sup>55</sup> but Lord Ellenborough declares, in *Vallance v. Dewar*,<sup>56</sup> that “if a usage be general, though not uniform, the underwriters are bound to take notice of it.” Mr. Duer<sup>57</sup> explains the word “uniform,” as used by Lord Ellenborough, to mean “universal,” and says: “It is not necessary that the usage, when it is a usage of trade, or, in the technical application of words, to be uniform, should be universal: that is, should be followed at all times by all persons or vessels concerned or employed in the trade to which it relates, for this would be inconsistent with the meaning which in these cases is attributed to the word ‘general.’” A usage which is uniform is not, however, necessarily a valid one, although of long continuance, as where it is a particular usage

is declared that by “unreasonable” is meant not that the usage itself is not reasonable, but that the unreasonableness consists in supposing that the parties included a certain usage in their contract: 1 *Parsons on Insurance*, ed. 1868, 102, 103. But see *Ougier v. Jennings*, 1 *Camp*. 505, where Lord Eldon instructed the jury, “If you think the usage does exist, if you think it reasonable” that sending a ship on an intermediate voyage might be reasonable.

<sup>52</sup> See *Trott v. Wood*, 1 *Gall. (C. C.)* 442, per Story, J.; *Missouri etc. R. R. Co. v. Fagan*, 72 *Tex.* 127; 13 *Am. St. Rep.* 776; *Collings v. Hope*, 3 *Wash. (C. C.)* 149; *Southwestern etc. Co. v. Stanard*, 44 *Mo.* 71; 100 *Am. Dec.* 255; *Steele v. McTyer’s Admr.*, 31 *Ala.* 677; 70 *Am. Dec.* 516, and note, 523.

<sup>53</sup> See secs. 239, 240, herein.

<sup>54</sup> 9 *Met. (Mass.)* 363.

<sup>55</sup> *Trott v. Wood*, 1 *Gall. (C. C.)* 443, per Story, J.

<sup>56</sup> 1 *Camp.* 508.

<sup>57</sup> 1 *Duer on Insurance*, ed. 1845, 264, sec. 58, note b.

and not known to the assured, and where the result of its application would be unreasonable.<sup>58</sup>

**§ 245. Parties may by Express Contract Include or Waive Usage.**—It is undoubtedly true that parties may by express reference in the policy to certain valid usages adopt such usages as the standard by which their rights under the contract may be determined, and the contract will be construed thereby.<sup>59</sup> It is likewise true, as we have before stated,<sup>60</sup> that the parties may always expressly contract so as to waive usage.<sup>61</sup>

**§ 246. Usage Admissible Where Contract Ambiguous or Obscure.**—Where the terms of the contract are ambiguous or obscure or indefinite, or where the words have by the usages of trade acquired a particular meaning, or are technical or local, usage is admissible to explain them.<sup>62</sup> The “true and appropriate office of a usage or custom,” says Story, J.,<sup>63</sup> “is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contracts,” and “courts have long allowed mercantile instruments to be expounded according to the custom of merchants.”<sup>64</sup> So the “contract of insurance is presumed to have been made with reference to the usages of the place to which the contract

<sup>58</sup> *McGregor v. Insurance Co.*, 1 Wash. (C. C.) 39, per Washington, J.

<sup>59</sup> *Union Bank v. Union Ins. Co.*, Dud. (S. C.) 171.

<sup>60</sup> See sec. 196, herein.

<sup>61</sup> *The Schooner Reeside*, 2 Sum. (C. C.) 570, per Story, J.

<sup>62</sup> See *Allegre v. Maryland Ins. Co.*, 6 Har. & J. (Md.) 408; 14 Am. Dec. 289; *Coit v. Commercial Ins. Co.*, 7 Johns. (N. Y.) 385; 5 Am. Dec. 282; *Winthrop v. Union Ins. Co.*, 2 Wash. (C. C.) 7; *Hancox v. Fishing Ins. Co.*, 3 Sum. 132; *Eyre v. Marine Ins. Co.*, 5 Watts & S. (Pa.) 116; *Wigglesworth v. Dallison*, 1 Doug. 207; *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *Harris v. Nicholas*, 5 Munf. (Va.) 483; *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33; 93 Am. Dec. 293; *Rankin v. American Ins. Co.*, 1 Hall (N. Y.), 619; *Mooney v. Howard Ins. Co.*, 138 Mass. 375; 52 Am. Rep. 277; *United States v. Macdaniel*, 7 Pet. (U. S.) 1, 13, 14; *Murray v. Hatch*, 6 Mass. 477; *New York etc. Co. v. Washington Ins. Co.*, 10 Bosw. (N. Y.) 428; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 64.

<sup>63</sup> *Schooner Reeside*, 2 Sum. (C. C.) 569.

<sup>64</sup> *Smith v. Wilson*, 3 Barn. & Adol. 728, per Parke, J.



has reference,"<sup>65</sup> and usage may be proved by parol, although it has its origin in law or edict of the government.<sup>66</sup> Evidence of local custom is admissible to supply details in oral or written contracts in regard to which the contract itself is silent, or to explain provincialisms or technical terms which have acquired a known, fixed, and definite meaning different from the ordinary import of such terms, or where such terms, if not explained, are susceptible of more than one reasonable construction.<sup>67</sup> And, in general, evidence of usage is admissible to apply the written contract to the subject matter of the action, to explain expressions used in a particular sense by particular persons as to particular subjects, and to give effect to language in a contract as it was understood by those who made it.<sup>68</sup>

**§ 247. Usage Inadmissible to Contradict or Substantially Vary the Plain Terms of the Policy.**—It reasonably follows from the rule that parties may make such valid contracts as they wish, that usage is inadmissible to contradict, nullify, or substantially vary the positive terms in which they have expressly stipulated, where the words are clear and are of a plain and decisive character. To admit such evidence for such purpose would establish the principle that courts can, by construction, incorporate into the policy that which was never contemplated by the parties, and would allow mere presumptions and implications to overthrow the most formal and deliberate declarations of the parties.<sup>69</sup> It was early stated by Emerigon,<sup>70</sup> who refers to Vattel,<sup>71</sup> "that the first general rule of construction is that it is not permitted to interpret what has no need of interpretation."<sup>72</sup> And "if the parties have ex-

<sup>65</sup> *Cobb v. New England Mut. Ins. Co.*, 6 Gray (72 Mass.), 192, 200.

<sup>66</sup> *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.), 506. Time policies are said by Mr. Duer (1 Duer on Insurance, ed. 1845, 205) to embrace all usages or none.

<sup>67</sup> *Barlow v. Lambert*, 28 Ala. 704; 65 Am. Dec. 374, and note, 379.

<sup>68</sup> *Smith v. Clews*, 114 N. Y. 190; 11 Am. St. Rep. 627.

<sup>69</sup> *Schooner Reeside*, 2 Sum. (C. C.) 369, per Story, J. See *New York Ins. Co. v. Thomas*, 3 Johns. Cas. (N. Y.) 1, per Kent, J.

<sup>70</sup> Emerigon on Insurance, Meredith's ed., c. ii, sec. 7, p. 49.

<sup>71</sup> *Droit des Gens*, liv. 3, c. 17.

<sup>72</sup> "When an instrument is conceived in clear and precise terms,

plained themselves on the point in a precise, special, and clear manner, all interpretation becomes superfluous, *cum in verbis nulla est ambiguitas non debet admitti voluntatis in quaestio*; and the stipulated agreement must be adhered to."<sup>73</sup> The words "precise," "clear," and "special," used by Emerigon, add much to the force of the rule, make it easier of application, and operate more strictly to the exclusion of usage.<sup>74</sup> So Harlan, J., in *Grace v. American Central Insurance Company*<sup>75</sup> declares that "an express written contract embodying in clear and positive terms the intention of the parties cannot be varied by evidence of usage or custom," and there are numerous authorities of like tenor.<sup>76</sup>

when its sense is manifest and leads to nothing absurd, there is no excuse for refusing the meaning it naturally presents. To seek elsewhere conjectures to restrain or enlarge it is to wish to evade it": Emerigon on Insurance, Meredith's ed., c. ii, sec. 7, p. 49. And he adds that when in doubt as to the interpretation, "it must be understood with reference to principles of law and to the practice of commerce."

<sup>73</sup> Emerigon on Insurance, Meredith's ed. 1850, c. xiii, sec. 7, p. 555. "If the covenants are clear in themselves, and contain nothing prohibited by law, the judge is not allowed to stray out of them"; that it is only where the contract is ambiguous "that the magistrate is authorized to form his decision by the light which legal equity, the common law, the nature of the contract, and the circumstances of the case may afford him": Emerigon on Insurance, Meredith's ed. 1850, c. i, sec. 5, p. 17. It will be observed that Emerigon uses the words "clear" and "precise." The words "plain and decisive character" are also used by Hubbard, J., in *Macy v. Whaling Ins. Co.*, 9 Met. (50 Mass.) 363. So, also, in 1 Arnould on Marine Insurance, Perkins' ed. 1850, 64 a, note, who says: "Where, however, the terms employed are clear and precise in themselves," etc., no evidence of usage is admissible. See, also, 1 Parsons on Insurance, ed. 1868, 84, note.

<sup>74</sup> See remarks in 1 Parsons on Insurance, ed. 1868, 83, 84, note 1. See, also, 1 Arnould on Insurance, Perkins' ed. 1850, 75, rule iii, sec. 44.

<sup>75</sup> 109 U. S. 283.

<sup>76</sup> *Hone v. Mutual S. Ins. Co.*, 1 Sand. (N. Y.) 137; 2 N. Y. (2 Comst.) 235; *Hall v. Jansen*, 4 El. & B. 508, per Campbell, C. J.; *Latotus v. Farmers' Mut. F. Ins. Co.*, 3 Houst. (Del.) 254; *Winthrop v. Union Mut. Ins. Co.*, 2 Wash. (C. C.) 7; *Smith v. Mobile Nav. Ins. Co.*, 30 Ala. 167; *Crofts v. Marshall*, 7 Car. & P. 597, 607, per Lord Denman; *Illinois etc. Soc. v. Baldwin*, 56 Ill. 479; *Duncan v. Green*, 43 Iowa, 679; *McGregor v. Pennsylvania Ins. Co.*, 1 Wash. (C. C.) 42; *St. Nicholas Ins. Co. v. Mercantile Mut. Ins. Co.*, 5 Bosw. (N. Y.) 238; *Bargett v. Orient Ins. Co.*, 3 Bosw. (N. Y.) 385; 1 Arnould on Insurance, Perkins' ed. 1850, 78, rule iv; 1 Parsons on Insurance, ed. 1868,

§ 248. **Same Subject—Cases and Authorities.**—Evidence of usage for vessels to go to two ports in the same island is inadmissible where the contract is written and plain, and the usage is inconsistent with and repugnant to the contract.<sup>77</sup> So usage is held inadmissible to qualify an express stipulation as to keeping a watch nights by showing that certain rights were excepted by custom,<sup>78</sup> nor can the practice of an insurance company to surrender the notes of its members and cancel their policies on the happening and payment of losses be shown to contradict or vary the terms of the policy or note.<sup>79</sup> And usage will not permit a deviation contrary to the terms of a policy expressly giving liberty to touch at a particular port,<sup>80</sup> nor can evidence be received against the plain language of the policy of a custom that a marine policy on goods shipped from New Orleans to Mobile covers the overland transportation of the goods by railroad.<sup>81</sup> And where the policy provides in express terms that the company shall pay the amount of loss without any deduction, a custom or usage of the company which would vary or limit such express agreement is inadmissible.<sup>82</sup> So a local custom among insurers to pay only a certain proportion of the loss is inadmissible to vary or control the plain terms of the contract or to reduce the amount of recovery.<sup>83</sup> It is also held that where the contract is susceptible of a reasonable construction on its face, custom or usage is inadmis-

85, et seq. Mr. Duer (1 Duer on Insurance, ed. 1845, 269) says, that usage must be consistent with the terms of the policy, and is never admissible to contradict its terms or to nullify or expunge them. "Usage may be admissible to explain what is doubtful. It is never admissible to contradict what is plain": *Blackett v. Royal Exch. Assur. Co.*, 2 Crompt. & J. 244. "Where the terms of a contract are plain, usage can have little effect upon the construction to be placed upon it": *Boldero v. East India Co.*, 26 Beav. 316.

<sup>77</sup> *Hearne v. Marine Ins. Co.*, 20 Wall. (U. S.) 488.

<sup>78</sup> *Ripley v. Etna F. Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362, and note 371.

<sup>79</sup> *New Hampshire etc. Ins. Co. v. Rand*, 4 Fost. (24 N. H.) 428. See *Mutual Assur. Soc. v. Scottish U. & N. Ins. Co.*, 84 Va. 116; 17 Ins. L. J. 570.

<sup>80</sup> *Elliott v. Wilson*, 4 Brown Parl. C. 470.

<sup>81</sup> *Smith v. Mobile Nav. etc. Co.*, 30 Ala. 167.

<sup>82</sup> *Swanscot M. Co. v. Partridge*, 5 Fost. (25 N. H.) 369.

<sup>83</sup> *Mutual S. Ins. Co. v. Hone*, 2 N. Y. (2 Comst.) 235.

sible to vary its language, although the instrument be an open or running policy and the contested clauses are scattered over the document.<sup>84</sup> Where the policy was drawn in accordance with the terms, and the proposal provided for insurance "on the charter of the barque 'Maria Henry,' Liverpool to port in Cuba, and thence to port of advice and discharge in Europe," evidence was held inadmissible to show a usage for vessels so chartered to go to two ports in Cuba.<sup>85</sup>

**§ 249. Whether Usage Controls the Plain and Legal Import of Words of the Policy.**—It is said that usage must be consistent with the rules of law, but exactly what is meant by "consistent" is much controverted.<sup>86</sup> If usage is admissible to control the plain and legal import of the words of the policy, the rule given in the last section would be too limited in its application.<sup>87</sup> It is held that usage can only be resorted to where the law is unsettled. Chancellor Walworth<sup>88</sup> declares that "if the terms employed have received a settled legal construction, that must govern, and no evidence of a particular custom or usage in opposition to such legal construction can be received."<sup>89</sup> So Sandford, J., declares:<sup>90</sup> "We find it clearly settled that a general usage, the effect of which is to control rules of law, is inadmissible, so

<sup>84</sup> *Insurance Co. v. Wright*, 1 Wall. (U. S.) 456.

<sup>85</sup> *Hearn v. New England Mut. M. Ins. Co.*, 4 Cliff. (C. C.) 200.

<sup>86</sup> Usage must be consistent with the rules of law. This rule, however, is to be explained and limited, since a usage inconsistent with an established rule of commercial law may be allowed to prevail, and a definite rule of law is frequently set aside, although plainly applicable, and every rule of law which the parties may by stipulation vary or prevent is subject to a valid usage: 1 Duer on Insurance, ed. 1845, 271, et seq. This means only that the usage must be consistent with the rules of law, in the same sense that the policy itself is a prohibited usage cannot be made valid, no matter how long practiced.

<sup>87</sup> *Winthrop v. Union Ins. Co.*, 2 Wash. (C. C.) 7.

<sup>88</sup> *Dow v. Whitten*, 8 Wend. (N. Y.) 168.

<sup>89</sup> In 1 Duer on Insurance, ed. 1845, 229, it is said that this rule is true only in a very limited sense. In 1 Parsons on Insurance, ed. 1868, 98, it is said: "We apprehend that in this remark a distinction is lost sight of between law properly so called and the mere result of decisions, as to the meanings of words. Usages continually vary, and do certainly change from time to time."

<sup>90</sup> *Hone v. Mutual S. Ins. Co.*, 1 Sand. (N. Y.) 149.

of one which contradicts a settled rule of commercial law.”<sup>91</sup> Mr. Arnould<sup>92</sup> says, parol evidence “will never be admitted to set aside or control its (the policy’s) plain and unambiguous terms.”<sup>93</sup> But the same author, however,<sup>94</sup> also declares that usage is admissible to explain the meaning or words which are ambiguous in themselves, or made so by proof of extrinsic circumstances. Mr. Marshall says<sup>95</sup> that “usage is only to be consulted where the law is doubtful. Where the law is clear it must prevail.”<sup>96</sup> He also asserts<sup>97</sup> that “the usage of trade often controls the general construction of the policy.” In *Homer v. Dorr*,<sup>98</sup> it is declared that the “usage of no class of citizens can be sustained in opposition to principles of law.” So it is said in *Bargett v. Orient Insurance Company*<sup>99</sup> that “no usage can exist or be proved by which the liabilities of parties to a written contract will be greater or less than the written law of the state has adjudged it to be.” Mr. Parsons<sup>100</sup> says: “No usage can be relied upon which opposes either a rule or principle of law. . . . If terms have received by definite adjudication a fixed and definite meaning, no usage will be permitted to show that the parties had another meaning,” but he also asserts, in an earlier part of his work,<sup>101</sup> that it must not be understood “that where words are unambiguous, and have as commonly used a plain and certain meaning, usage is never permitted to control or vary its meaning,” and that it is certain “that the natural and ordinary meaning of the words, as

<sup>91</sup> See this case as to the general rule of construction, also as to usage and how far usage is admissible; and same case, 2 N. Y. (2 Comst.) 235.

<sup>92</sup> 1 Arnould on Insurance, Perkins’ ed. 1850, 78, sec. 45, rule iv.

<sup>93</sup> This rule is criticised as too broad: 1 Parsons on Insurance, ed. 1868, 83, note.

<sup>94</sup> 1 Arnould on Insurance, Perkins’ ed. 1850, 75, sec. 44, rule iii.

<sup>95</sup> 1 Marshall on Insurance, ed. 1810, 707 a.

<sup>96</sup> Criticised in 1 Duer on Insurance, ed. 1845, 235.

<sup>97</sup> 2 Marshall on Insurance, ed. 1810, 727.

<sup>98</sup> 10 Mass. 26, 28. This decision is said to be erroneous, and irreconcilable with *Long v. Allen*, 4 Doug. 276, in 1 Duer on Insurance, ed. 1845, 246, 247. It is also said of *Homer v. Dorr*, “that this decision has never been acted upon,” in note attached to the case. See, also, 1 Parsons on Insurance, ed. 1868, 96, note 3.

<sup>99</sup> 3 Bosw. (N. Y.) 397.

<sup>100</sup> 1 Parsons on Insurance, ed. 1868, 97, 98.

<sup>101</sup> 1 Parsons on Insurance, ed. 1868, 83.

that may be determined by common use, may be controlled by evidence of usage." Mr. Wood<sup>102</sup> states the rule as follows: "If the words written in the policy have received a judicial construction, and also a peculiar commercial construction by usage variant with such judicial construction, the judicial construction is to control, but if no judicial construction has been given to them, and by usage they have acquired any meaning variant from that in which they are ordinarily used, such meaning by usage may be shown, unless from the whole instrument it was evident they were used in their ordinary sense." Emerigon<sup>103</sup> says: "In most cases it is very probable that words have been used in their ordinary sense; that always implies a very strong presumption which cannot be overcome but by a contrary presumption still stronger"; and he adds<sup>104</sup> that inasmuch as insurance is a contract *bonae fides*, "the subtleties of law are to be made to yield to that of equity, which is the soul of commerce. . . . The clauses of the contract are to be interpreted according to the style, the customs, and usages of the place where the insurance has been made, though the inclination of the common law might appear different." It is also declared in *Long v. Allen*<sup>105</sup> that evidence of usage might be received to explain or control the policy. Mr. Phillips<sup>106</sup> says this "is true if 'to control' means to interpret the policy, and give a meaning to it different from that imputed by the language in its ordinary acceptance, but that the use of the word in this connection is likely to convey an erroneous meaning," and that "evidence of usage cannot be admitted to control what is written in contrast with explaining it." The words of Buller, J., are, we apprehend, made clearer if considered in connection with those used by him in *Brough v. Whitmore*,<sup>107</sup> where he declares that he "would not, on account of any usage to the contrary among underwriters, overturn a solemn determination of this court." Although in *Long v. Allen*<sup>108</sup> Lord Mansfield said: "The law

<sup>102</sup> 1 Wood on Fire Insurance, 2d ed., 143.

<sup>103</sup> Emerigon on Insurance, Meredith's ed. 1850, c. ii, sec. 7, p. 50.

<sup>104</sup> Id., c. i, sec. 5, p. 17.

<sup>105</sup> 4 Doug. 276, per Buller, J., and note.

<sup>106</sup> 1 Phillips on Insurance, 3d ed., 86.

<sup>107</sup> 4 Term Rep. 210.

<sup>108</sup> 4 Doug. 276.

is clear that where the risk has never commenced the premium shall be returned," but it was held, nevertheless, that a usage that in certain cases the premium should be returned, deducting a per centum, would control. Mr. Duer<sup>109</sup> says the distinction made by Buller, J., is perfectly accurate, since where the words are ambiguous, usage "explains" them, "but where they convey a definite meaning that the court would be bound to adopt, or their construction has been settled by law, the usage controls them, and in these cases it does set aside what . . . was the plain intention of the parties, but in controlling, the usage does not contradict the words—it merely varies by restraining or enlarging their application." He also lays down the proposition that while usage may modify or control the policy, yet it must be consistent with its terms, and is inadmissible to contradict its express words;<sup>110</sup> and finally he declares that "in the only cases in which the evidence has been admitted to supersede a rule of law the usage was solely derived from a use and practice between the assurers and the assured, and they contain no intimation that when the usage is of a different character the evidence could be justly received."<sup>111</sup>

<sup>109</sup> 1 Duer on Insurance, ed. 1845, 245.

<sup>110</sup> 1 Duer on Insurance, ed. 1845, 186, 269, 270.

<sup>111</sup> 1 Duer on Insurance, ed. 1845, 275, citing *Edie v. East India Co.*, 2 Burr. 12, 16; *Frith v. Barker*, 2 Johns. (N. Y.) 328; *Halsey v. Brown*, 3 Day (Conn.), 46; *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 592; *Lennox & Kennebeck Bank v. Page*, 9 Mass. 158; *Stewart v. Aberdeen*, 4 Mees. & W. 228. "It has been seriously doubted by eminent judges whether a usage not adopted nor referred to in the policy ought ever to be permitted to control its operation. . . . Yet the propriety of receiving the evidence, when subject to its just limitations, is readily conceded": Duer on Insurance, ed. 1845, 178, sec. 29, citing Lord Holt in *Lethiellier's case*, 2 Salk. 443; Lord Eldon, in *Anderson v. Pitcher*, 2 Bos. & P. 168; Story, J., in *Schooner Reeside*, 2 Sum. (C. C.) 567, and in *Palmer v. Warren Ins. Co.*, 1 Story (C. C.), 360. "A usage in the interpretation of the policy is the substitute for a judicial decision, and that which supercedes a rule of law has itself the force of law in the cases to which it applies": 1 Duer on Insurance, ed. 1845, 261. "Upon an examination of the decisions, it will appear that in a large majority of the cases the effect of the usage as proved was to set aside a construction, or supersede a rule that the court must otherwise of necessity have followed; . . . the usage, therefore, overrules and sets aside a plain and settled construction": *Id.* 256. "A usage sufficiently and clearly proved has a controlling effect to vary the plain import or set-

§ 250. *Same Subject—Opinions and Cases.*—It is held that general usage operating as a general rule of law may be pleaded against a contract plain and unambiguous in its terms.<sup>112</sup> So it is said: "Evidence is admissible to show that the contract, notwithstanding the common meaning of the language used, was in fact made in reference to the usage in the trade to which the contract relates."<sup>113</sup> Language substantially to the same effect is used in another case, where it is said that usage may be "admitted to vary and control the language used in the policy, and to give a construction different from that which it otherwise would have received or did receive."<sup>114</sup> A general and established rule of law may be set aside even by a particular and local usage, as in case of a usage at Lloyds, proven to have been known to underwriters. This is so decided in *Stewart v. Aberdeen*.<sup>115</sup> So a rule of law may be controlled by a particular usage between the parties known to them and the basis of contracting.<sup>116</sup> So a usage at Lloyds as to ad-

tled construction of the words of the policy, or to prevent the application of an established rule of law by which the rights of the parties under their contract would otherwise be determined": 1 Duer on Insurance, ed. 1845, 257, citing *Preston v. Greenwood Ins. Co.*, 4 Doug. 28, per Lord Mansfield. "Usage is always considered in policies of insurance, even when no difficulty arises on the words themselves." The test is, "whether the rule of law that the usage supersedes is one that, in its application to their own contract, the parties themselves were competent to change. If this position be correct, the propriety of the decision of the supreme court of New York, in *Frith v. Barker*, 2 Johns. (N. Y.) 328, seems very questionable": 1 Duer on Insurance, ed. 1845, 303. It was held in the decision referred to that usage is inadmissible to change a settled rule of commercial law. "Now, the rule in question is certainly one that the parties may change by an express stipulation": 1 Duer on Insurance, ed. 1845, 303.

<sup>112</sup> *Lattonous v. Farmers' Mut. F. Ins. Co.*, 3 Houst. (Del.) 254. In this case the text was the argument of counsel for plaintiff on demurrer, which demurrer was sustained, but no opinion given.

<sup>113</sup> *Macy v. Whaling Ins. Co.*, 9 Met. (50 Mass.) 363, per Hubbard, J.

<sup>114</sup> *Eyre v. Marine Ins. Co.*, 5 Watts & S. (Pa.) 116, 122, per Sergeant, J. See s. c., 6 Whart. (Pa.) 249. Mr. Duer (1 Duer on Insurance, ed. 1845, 296) says this "language involves the not infrequent error of confounding a usage of trade and a usage in the interpretation of the policy."

<sup>115</sup> 4 Mees. & W. 211.

<sup>116</sup> *Renner v. Bank of Columbia*, 9 Wheat. (U. S.) 582, per Thompson, J., an exhaustive opinion.



justment has been admitted, although contrary to the principle of indemnity, which governs marine insurance.<sup>117</sup> So a custom of adjusting partial losses may be shown, and must govern the general law regulating the assessment of damages under such policies.<sup>118</sup> "It is a principle that the general common law may be, and in many instances is, controlled by special custom, so the general commercial law may by the same reason be controlled by a special local usage so far as that usage extends."<sup>119</sup> So it is said in an Ohio case<sup>120</sup> that "if it be assumed that the custom is a general one, then it is part of the common law itself, and there would be presented an instance of two rules of law equally binding, and yet wholly inconsistent the one with the other," although the point decided in this last case was that a usage which is not according to law, though universal, cannot be set up to control the law. Mr. Lawson says: "It was no objection to a common-law custom that it was contrary to the common law of the land. . . . In general, too, evidence of a usage of trade is not inadmissible, because it is contrary to the principles of law governing such cases, for it is obvious that if proof of a usage could be rejected because it established something different from the law, no custom would ever be proved, because if it were not different it would be a part of the law,"<sup>121</sup> and he adds:<sup>122</sup> "This being so plain, it is somewhat startling to find a large number of cases in the reports in which the principle is broadly laid down that a usage or custom in opposition to an established rule of law

<sup>117</sup> *Palmer v. Blackburn*, 1 Bing. 61.

<sup>118</sup> *Fulton Ins. Co. v. Milner*, 23 Ala. 420.

<sup>119</sup> *Halsey v. Brown*, 8 Day (Conn.), 346. See, also, cases considered at length by Mr. Duer in support of his proposition cited under sections 249 and 250 herein, and also cited under "Proofs and Illustrations," 291, et seq. See, also, *Id.* 294, where *McGregor v. Insurance Co.*, 1 Wash. (C. C.) 391, and *Trott v. Wood*, 1 Gall. 443, are cited as supporting his proposition. See cases cited in 1 *Parsons on Insurance*, ed. 1868, 83, 84, and notes.

<sup>120</sup> *Columbus etc. Ins. Co. v. Tucker*, 48 Ohio St. 41; 29 Am. St. Rep. 528, 534, per Spear, J.

<sup>121</sup> *Lawson on Usages and Customs*, ed. 1881, 465, sec. 225.

<sup>122</sup> *Id.*, sec. 226.

is void and of no effect," and, noting the cases, he asserts that the meaning of the various expressions used is this: "That a custom or usage which changes what would otherwise be the situation of the parties, or alters to any extent their rights according to the rules of law applicable to such cases, is invalid and ineffectual," and in a subsequent section he notes a large number of cases in insurances where usages in conflict with established rules of law have been controlled by evidence of different customs.<sup>123</sup> As opposed to the above cases and opinions there are numerous decisions which sustain the general proposition that usage is inadmissible to control a rule of law, or the plain and legal import of the words used in a policy of insurance.<sup>124</sup> So where the term of a lease is fixed by statute, evidence of usage to control its operation has been held inadmis-

<sup>123</sup> *Id.*, sec. 233; and see *Id.*, sec. 234.

<sup>124</sup> *Winthrop v. Union Ins. Co.*, 2 Wash. (C. C.) 7; *Rankin v. American Ins. Co.*, 1 Hall (N. Y.), 619, 682. Mr. Duer (1 *Duer on Insurance*, ed. 1845, 231) says of this case: "It was certainly no objection that the usage would have varied the construction of the policy," and that it would not have rendered a single word of it inoperative, but have only qualified its terms conditional upon usage: *Lattonous v. Farmers' Mut. F. Ins. Co.*, 3 Houst. (Del.) 254; *Warren v. Franklin Ins. Co.*, 104 Mass. 521 (held custom of particular port could not vary rule of law as to damages). Usage "cannot be allowed to control the settled and acknowledged law of the state": *Higgins v. Moore*, 34 N. Y. 425 (usage in this case not a general usage); *Mobile etc. Ins. Co. v. McMillan*, 27 Ala. 77; *St. Nicholas Ins. Co. v. Mercantile Ins. Co.*, 5 Bosw. (N. Y.) 238, 246. Evidence of local custom is inadmissible to contravene any express contract or provision of law: *Barlow v. Lambert*, 28 Ala. 704; 75 Am. Dec. 374. "We think it clearly settled by the decided weight of authority that a general usage, the effect of which is to control a rule of law, is inadmissible": *Boon & Co. v. Steamboat Belfast*, 40 Ala. 184; 88 Am. Dec. 761 (in this case proof was held inadmissible of a custom by which all carriers navigating the river were relieved from liability for losses occasioned by armed bodies of men without fault or negligence of the carrier). See, also, *Boardman v. Spooner*, 13 Allen (Mass.), 353; 90 Am. Dec. 196; *Dickinson v. Gay*, 7 Allen (Mass.), 29; 83 Am. Dec. 656; *Cranwell v. Ship Fosdick*, 15 La. Ann. 436; 77 Am. Dec. 190; *Cox v. Riley*, 4 Ind. 368; 58 Am. Dec. 633, and note 638; *Southwestern F. & P. Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 255. *Hopper v. Sage*, 112 N. Y. 530; 8 Am. St. Rep. 771. A person cannot establish a usage or custom which in his own interest contravenes an established rule of commercial law: *Jackson v. Bank*, 92 Tenn. 154; 36 Am. St. Rep. 81. That local usage to overthrow an established rule of law is inadmissible, see *Merchants' Ins. Co. v. Prince*, 50 Minn. 56,

sible.<sup>125</sup> So usage to give notice of increase of risk is inadmissible to control the legal effect of the policy;<sup>126</sup> nor can a local custom to deduct one-third new for old from the gross amount of the expenses and repairs, without first deducting the proceeds of the old materials, control a general principle of law requiring such deduction of the proceeds of the old materials.<sup>127</sup> Evidence is admissible of usage of words in peculiar senses in an application for insurance where, although such words severally and as first read seem plain, an ambiguity becomes apparent when they are applied to the subject matter,<sup>128</sup> and when words are used in policies having a limited meaning in the trade, both parties must be assumed to have understood it in the sense in which the trade usually understood it.<sup>129</sup> So if any of the terms used in a policy have by the known usage of trade, or by use and practice as between insurer and insured acquired an appropriate sense, they are to be construed accordingly.<sup>130</sup>

§ 251. **Same Subject—Conclusion.**—We believe that Mr. Duer's position is not irreconcilable with the law as gen-

57; 52 N. W. Rep. 131, per Gilfillan, C. J. See *Seccomb v. Provincial Ins. Co.*, 10 Allen (92 Mass.), 312-14, per Bigelow, C. J., where it is said that usage is inadmissible to vary or control the written words, and give them a different construction than that given them by settled judicial determinations, but that it is admissible to show the sense in which particular words or phrases are used, and to show that as applied to the subject matter the language of the instruments was understood by the parties to have a special and peculiar meaning, differing from that which might ordinarily be attributed to it, and that this is especially true of policies of assurance. And see *Lawson's Usages and Customs*, ed. 1881, 465, secs. 226, 234, and cases collected; and articles of Jno. D. Lawson, 6 S. Rev., N. S., 845; 7 Id. 1; *Eaton v. Smith*, 20 Pick. (37 Mass.) 156.

<sup>125</sup> *Jackson v. Billing*, 22 La. Ann. 378.

<sup>126</sup> *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y.), 632, 674.

<sup>127</sup> *Eager v. Atlas Ins. Co.*, 14 Pick. (31 Mass.) 141; 25 Am. Dec. 363.

<sup>128</sup> *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (66 Mass.) 429; 59 Am. Dec. 192.

<sup>129</sup> *Wall v. Howard Ins. Co.*, 14 Barb. (N. Y.) 383; *Astor v. Union Ins. Co.*, 7 Cow. (N. Y.) 202.

<sup>130</sup> *Coit v. Commercial Ins. Co.*, 7 Johns. (N. Y.) 385; 5 Am. Dec. 282. See, also, as to evidence of usage to control forfeiture for nonpayment of premium, chapter on Premiums.

erally stated by the courts and text-writers, and is entitled to consideration. Certainly, if the parties could incorporate by express terms in their contract a usage which would have controlled the plain and ordinary meaning of words used in the policy, then may not a known usage, with reference to which the parties expressly contracted, have a like effect? We apprehend, however, that whatever distinction exists between the statement of Mr. Duer and those of Emerigon and the others above considered, is more apparent than real. Mr. Duer says that usage must be consistent with the rules of law. His illustrations are those of a particular usage known to the parties, with express reference to which the contract was made, and which became thereby a part thereof. He asserts that usage does control words that convey a definite meaning, which the court would otherwise be bound to adopt, or where their construction has been settled by law,<sup>131</sup> and does set aside what, judging from the terms of the policy or the rules of law, was the plain intention of the parties, "but," he adds, "in controlling, the usage does not contradict the words—it merely varies by restraining or enlarging their application," and that usage "can never be admitted to nullify or expunge" the plain words of a contract.<sup>132</sup> The use of the word "control," in this sense, does not seem irreconcilable with the conclusions of eminent and learned judges and text-writers. We deduce, therefore, from the authorities that the presumption is that words have been used in their ordinary sense, and if words are of such a plain and decisive character that a reference to the subject matter and context shows the evident intent of the parties to be in accordance with this presumption, then usage is inadmissible to vary or control the plain and legal import of words. This presumption, that words have been used in their ordinary sense, may be overcome by a contrary presumption still stronger: thus, if words apparently plain and unambiguous are shown to be ambiguous in fact, then evidence of usage to control their meaning is admissible. A settled judicial construc-

<sup>131</sup> 1 Duer on Insurance, ed. 1845, 245.

<sup>132</sup> Id. 270.

tion governs a commercial construction by usage, variant therewith, so far certainly, as the rights of parties are dependent upon settled rules of law, and the contract is made clearly with reference thereto. But custom or usage, may undoubtedly affect and control what before was law, especially in insurance cases where the custom is of such a character that the parties may reasonably be assumed to have been fully cognizant thereof, and to have contracted in reference thereto. Where plain words have acquired by usage a meaning different from that in which they are ordinarily used, evidence of such usage is admissible, unless it is clearly evident from the subject matter and context that the ordinary meaning was intended, and usage can never be admitted to nullify or expunge the plain words of the contract.<sup>133</sup>

**§ 252. Usage cannot Legalize an Illegal Act.**—It is held that a particular usage and custom by which owners of insured property were permitted to purchase the property at sales for the benefit of the insurers, cannot have the effect of legalizing a sale which by the general law is unlawful and void.<sup>134</sup>

**§ 253. General Usage may be Controlled by Evidence of a Different Usage.**—A general usage may be controlled by evidence of another and different usage. Thus, a custom for a ship to pursue a certain course which is the safest, most usual, and expeditious in the course of the voyage insured may be controlled by evidence that it is usual and customary for one boat on a voyage to stop and aid another boat in distress.<sup>135</sup> So it is held that a commercial usage of long standing, such as that of adding the premiums to the invoice value, in cases of insurance, may be modified and controlled by a local

<sup>133</sup> As to usage in foreign trade, see *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.), 506.

<sup>134</sup> *Robertson v. Western etc. Ins. Co.*, 19 La., O. S. (10 La. 143), 227; 36 Am. Dec. 673. See *Bryant v. Connecticut Ins. Co.*, 6 Pick. (23 Mass.) 131, 144.

<sup>135</sup> *Walsh v. Homer*, 10 Mo. 6; *Gould v. Oliver*, 2 Scott N. B. 252; 5 Scott, 445; 4 Bing. N. C. 134.

usage clearly proven and shown to be known to the other party.<sup>136</sup>

§ 254. **Usage Controls Implied Limitations.**—"The usage, and ordinary incidents of a risk should override any implied limitations, either as to the place or conduct of the risk."<sup>137</sup>

§ 255. **Usage of Another Similar Trade or Place or of Another Company.**—Evidence of usage in another similar trade was held by Lord Mansfield admissible, on the question whether a recently established usage existed.<sup>138</sup> Usage of a particular place, as of London, may be shown by proof of usage there and elsewhere.<sup>139</sup> But where the vessel was insured at New York, but belonged to New Bedford, where the owners resided, a local usage of the last-named place, by which taking sea elephants is not within the scope of "whaling voyage," is inadmissible, and a uniform usage of insurers to insert a permission for vessels insured on a whaling voyage to take sea elephants on payment of an additional premium is inadmissible to establish such local usage.<sup>140</sup> It is held that usage of the custom of other like establishments to keep a watch may be shown to explain the term "keeping a watch."<sup>141</sup> Where the contract is made with reference to local usages, usages of other places are not binding, for such usage cannot be considered as entering into the consideration of the parties,<sup>142</sup> and a usage of marine underwriters of Boston to except barratry of the master from the risks assumed, when the assured is her owner, will not import such an exception by implication

<sup>136</sup> *Merchants' Mut. Ins. Co. v. Wilson*, 2 Md. 217.

<sup>137</sup> 1 Wood on Fire Insurance, 2d ed., 116. The author here changes the rule from that given in a former edition with reference to cases where the words "contained in" are used in policies describing the risk.

<sup>138</sup> *Noble v. Kennoway*, 2 Doug., 3d ed., 510, per Lord Mansfield.

<sup>139</sup> *Millward v. Hibbert*, 3 Q. B. 120; 2 Gale & D. 142.

<sup>140</sup> *Child v. Sun Mut. Ins. Co.*, 3 Sand. (N. Y.) 26.

<sup>141</sup> *Brocker v. People's Mut. Ins. Co.*, 8 Cush. (62 Mass.) 79.

<sup>142</sup> *Mason v. Franklin F. Ins. Co.*, 12 Gill & J. (Md.) 468; *Child v. Sun Mut. Ins. Co.*, 3 Sand. (N. Y.) 26.

in a policy underwritten at Gloucester.<sup>143</sup> So a policy of insurance against fire upon a vessel building in the port of Baltimore, and for a specified period, is not controlled in its operation by proof of usage in other parts of the Union;<sup>144</sup> and a usage of towing boats by steamers on the Mississippi cannot affect a contract of insurance made at Natchez, unless shown to be so general and well known that it is fair to presume the parties contracted with reference to it.<sup>145</sup> A clause in a policy of marine insurance providing that all matters of adjustment and settlement of losses shall be subject to the rules and regulations of the ports of New York, refers only to the manner of making the adjustment when a liability is admitted, and cannot decide the question of the existence of any liability by the usage of such ports when the insurance is made elsewhere.<sup>146</sup> So the constructive total loss of a whaling ship at a port where whaling outfits are bought and sold, and where the outfits are in safety, is not a constructive total loss of the outfits; and evidence of a usage to regard it as such at the port from which the ship sailed is inadmissible.<sup>147</sup> And usage of the company in matters of insurance is inadmissible to bind another company.<sup>148</sup> Such evidence should be limited to the custom and usage of the company directly concerned. So the practice of other insurance agents in the same town is inadmissible to establish a custom that proofs of loss are not required.<sup>149</sup> But it is held, however, that the phrase "fire by lightning" may be shown, by evidence of the practice of other companies, to mean that the company is not liable where there is no burning.<sup>150</sup>

<sup>143</sup> *Parkhurst v. Gloucester etc. Ins. Co.*, 100 Mass. 301; 97 Am. Dec. 100.

<sup>144</sup> *Mason v. Franklin F. Ins. Co.*, 12 Gill & J. (Md.) 468.

<sup>145</sup> *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340; 41 Am. Dec. 592.

<sup>146</sup> *Hazleton v. Manhattan F. Ins. Co.*, 11 Biss. (C. C.) 210.

<sup>147</sup> *Taber v. China Mut. Ins. Co.*, 131 Mass. 239.

<sup>148</sup> *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *American Ins. Co. v. Neiberger*, 74 Mo. 167.

<sup>149</sup> *Phoenix Ins. Co. v. Munger* (Kan.), 30 Pac. Rep. 120.

<sup>150</sup> *Babcock v. Montgomery Co. Mut. Ins. Co.*, 6 Barb. (N. Y.) 637; 4 Comst. (N. Y.) 328.

§ 256. **Evidence of Usage—Liberal Construction.**—Much stress has been placed upon the statements made by the courts in many of the early insurance cases, looking toward a liberal construction of policies in reference to usage. Thus, it is said in *Long v. Allen*,<sup>151</sup> that “in mercantile cases from Lord Holt’s time, and in policies of insurance in particular, a great latitude of construction as to usage has been admitted. By usage, places come within the policy that are not within the words.” This idea, however, arose in a great measure from the clumsiness of the instrument,<sup>152</sup> and because insurance is based upon mercantile law and the customs of merchants, and that down to Lord Mansfield’s time there had been few adjudications on questions in insurance law and the custom of merchants, usage was necessary to be resorted to for interpretation;<sup>153</sup> but Story, J.,<sup>154</sup> says that usage, though in former times freely resorted to,<sup>155</sup> “is now subjected by our courts to more exact and well-defined restrictions . . . and it should therefore . . . be admitted with a cautious reluctance and scrupulous jealousy.”<sup>156</sup>

§ 257. **What is Sufficient Evidence of Usage.**—The court determines the admissibility of evidence of usage, and it will, as we have seen, be cautious in this respect, and the evidence thereof ought to be clear and satisfactory to the jury.<sup>157</sup> The question is, did the usage claimed exist, and this must be

<sup>151</sup> 4 Doug. 276, per Buller, J. See, also, *Coggeshall v. American Ins. Co.*, 3 Wend. 283.

<sup>152</sup> *Gordon v. Little*, 8 Serg. & R. (Pa.) 562; 11 Am. Dec. 632, per Gibson, J.

<sup>153</sup> See *Smith v. Wilson*, 3 Barn. & Adol. 728, per Parke, J.

<sup>154</sup> In *Rogers v. Mechanics’ Ins. Co.*, 1 Story (O. C.), 607.

<sup>155</sup> As a rule it was, but examine *Anderson v. Pitcher*, 2 Bos. & P. 168, per Lord Eldon; *Lethiellier’s case*, 2 Salk. 443, per Lord Holt.

<sup>156</sup> See, also, *Palmer v. Warren Ins. Co.*, 1 Story (O. C.), 360; *Schooner Reeside*, 2 Sum. (O. C.) 567, per Story, J.

<sup>157</sup> See *Pelly v. Royal Exch. Assur. Co.*, 1 Burr. 341, 349; *Leach v. Perkins*, 17 Me. 465; 35 Am. Dec. 268; *Lucas v. Growing*, 7 Taunt. 164; *Bentaloe v. Pratt*, Wall. 58; *Crofts v. Marshall*, 7 Car. & P. 597; *Winsor v. Dillawney*, 4 Met. 223; *Gabay v. Lloyd*, 3 Barn. & C. 793; *Greenleaf on Evidence*, 14th ed., sec. 292, et seq.



established by instances known to the witnesses, coupled with evidence of its duration and that it is uniform,<sup>158</sup> and a few or occasional instances are insufficient to establish a usage.<sup>159</sup> So of a single witness or individual,<sup>160</sup> and witnesses are confined to the fact of usage, and will not be permitted to give their opinions.<sup>161</sup>

**§ 258. Evidence of Usage, When Admissible—Cases.**—The following cases illustrate when usage is admissible: Thus, an insurer is liable for a loss occurring within the general course of a trade, of which he is presumed to have knowledge, as in case goods are lost from the deck of a lighter in being transmitted from the ship at quarantine to the customary landing place.<sup>162</sup> And a well-known usage of boats in the Mississippi trade to touch at intermediate ports will cover additions to the cargo received in the usual manner at such ports.<sup>163</sup> So if goods are lost while in transportation from the shore to a ship engaged in a trading voyage, the insurer is liable if such trans-

<sup>158</sup> *Illinois Masons' B. Soc. v. Baldwin*, 86 Ill. 479; *Syers v. Bridge*, Doug. 530, per Lord Mansfield; *Hennessy v. New York M. M. Ins. Co.*, 1 Old. (Nov. Sc.) 259; *Salisbury v. Townson*, 1 Burr. 341; *Rogers v. Mechanics' Ins. Co.*, 1 Story (C. C.), 603, per Story, J.; *Durrell v. Bed-erly*, 1 Holt N. P. 283, per Gibbs, J.; *Martin v. Delaware Ins. Co.*, 2 Wash. (C. C.) 254.

<sup>159</sup> *Crosby v. Fitch*, 12 Conn. 422; 31 Am. Dec. 745; *Trott v. Wood*, 1 Gall. (C. C.) 443; *Herman v. Western F. & M. Ins. Co.*, 13 La., O. S. (7 La., N. S., 325), 516; *Bunter v. Orient etc. Ins. Co.*, 4 Bosw. (N. Y.) 254; *Clevenger v. Mutual L. Ins. Co.*, 2 Dak. 114; *Bond v. Nutt*, Cowp. 601; *Cutter v. Powell*, 6 Term Rep. 320; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. (Mass.) 108.

<sup>160</sup> *Parrott v. Thatcher*, 9 Pick. (26 Mass.) 426; *Loring v. Gurney*, 5 Pick. (22 Mass.) 15.

<sup>161</sup> *Winthrop v. Union Ins. Co.*, 2 Wash. (C. C.) 7, per Washington, J.; *Crofts v. Marshall*, 7 Car. & P. 597; *Gordon v. Little*, 8 Serg. & R. (Pa.) 549; 11 Am. Dec. 632, 636, per Tilghman, O. J.; *Rogers v. Mechanics' Ins. Co.*, 1 Story (U. S.), 603, per Story, J.; *Astor v. Union Ins. Co.*, 7 Cow. 202; *Syers v. Bridge*, Doug. 512, 569; *Story, J.*, in *Rogers v. Mechanics' Ins. Co.*, 1 Story (C. C.), 607, declares that "this court has nothing to do with the private opinions of witnesses, however respectable, which respect the proper interpretation of contracts."

<sup>162</sup> *Wadsworth v. Pacific Ins. Co.*, 4 Wend. (N. Y.) 33.

<sup>163</sup> *Stillwell v. Home Ins. Co.*, 3 Dill. (C. C., 80.

portation is according to usage.<sup>164</sup> The course of trade in a particular place governs the construction, as where the usual method of unloading and reshipping in a place was "that when there is no British ship there, then the goods are to be kept in store ships," and if it is usual to stay a certain time at a port or to go out of the way, the insurer is considered as understanding that usage.<sup>165</sup> So acts done by the assured to avoid confiscation under the laws of a foreign power are valid if warranted by the usage of trade.<sup>166</sup> Thus a concealment of papers is not a breach of warranty if, by the usage of trade, it is necessary that they should be on board although they increase the risk of capture.<sup>167</sup> It may be shown that it is the custom generally to charge a higher premium for unoccupied dwelling-houses;<sup>168</sup> also that it is a general custom to refuse risks on vacant houses.<sup>169</sup> So usage is admissible to explain a blank, as "A B on account of ——" <sup>170</sup> So the nature of the subject matter may be such that usage is admissible to construe the contract,<sup>171</sup> and in estimating the damage in case of partial loss evidence is competent of the custom of merchants in relation to the sale.<sup>172</sup> So where the insurance was "from" Amsterdam, a custom for vessels of certain tonnage to take in part of their cargo at Amsterdam and the rest at another port is admissible.<sup>173</sup> So evidence of a custom for one boat to stop and aid another in distress is competent.<sup>174</sup> Usage of a particular trade to keep goods on board for a long time after the ship's arrival is

<sup>164</sup> *Coggeshall v. American Ins. Co.*, 3 Wend. (N. Y.) 283.

<sup>165</sup> *Pelly v. Royal Exch. Assur. Co.*, 1 Burr. 341, 348, 349. See, also, *Matthie v. Potts*, 3 Bos. & P. 23.

<sup>166</sup> *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.), 506.

<sup>167</sup> *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.), 274; 7 Cranch (U. S.), 506.

<sup>168</sup> *Luce v. Dorchester Mut. F. Ins. Co.*, 105 Mass. 298; 7 Am. Rep. 522.

<sup>169</sup> *Kirby v. Phoenix Ins. Co.*, 13 Lea (81 Tenn.), 340.

<sup>170</sup> *Turner v. Burrows*, 5 Wend. (N. Y.) 541; 8 Id. 144.

<sup>171</sup> *Sayles v. Northwestern Ins. Co.*, 2 Curt. (C. C.) 610, per Curtis,

<sup>172</sup> *Stanton v. Natchez Ins. Co.*, 6 Miss. (5 How.) 744.

<sup>173</sup> *Mey v. South Carolina Ins. Co.*, 3 Brev. (S. C.) 329.

<sup>174</sup> *Walsh v. Homer*, 10 Mo. 6; 45 Am. Dec. 342.

admissible.<sup>175</sup> So evidence is admissible of a particular custom whereby the party holding a certificate thereof kept an account of shipments made and covered by the certificate, reporting the same monthly to the agent.<sup>176</sup> So usage between a principal and his agent may determine their rights, as in case whether a lien on the policy exists in favor of the agent.<sup>177</sup> So the commencement<sup>178</sup> and termination of a risk may be determined by usage.<sup>179</sup> So a clearance for a port without intending to go there may be justified by a constant and notorious usage of the trade, as where it was the custom for ships going with British goods to France to clear for Ostend.<sup>180</sup> So evidence of a custom is admissible that policies executed, but not delivered, are held for the benefit of the insured.<sup>181</sup> So usage of commission merchants in New York to effect, without orders from their consignors, insurance on goods consigned to them for sale is admissible.<sup>182</sup> And usage to put into a certain port for bait where the vessel was engaged in cod-fishing may be shown.<sup>183</sup> So a contract may be governed in certain cases by the uniform and settled custom of the company, with reference to conditions contained in like policies,<sup>184</sup> and a usage by an incorporated benevolent society, showing a valid practical construction by it of a by-law relating to holding the annual meeting and election, is admissible in quo warranto to determine title to office in the society.<sup>185</sup> In all cases of local or partial usage the insurers will be bound where it was expressly communicated to them and the contract based thereon.<sup>186</sup>

<sup>175</sup> *Noble v. Kennoway*, Doug. 492.

<sup>176</sup> *Hartshorne v. Union etc. Ins. Co.*, 36 N. Y. 172.

<sup>177</sup> *Green v. Farmers*, 4 Burr. 2214.

<sup>178</sup> *Kingston v. Knibbs*, 1 Camp. 507.

<sup>179</sup> *Gracie v. Maryland Ins. Co.*, 8 Cranch (U. S.), 75.

<sup>180</sup> *Planche v. Fletcher*, Doug. 251.

<sup>181</sup> *Baxter v. Massasoit Ins. Co.*, 13 Allen (Mass.), 320.

<sup>182</sup> *De Forest v. Fulton F. Ins. Co.*, 1 Hall (N. Y.), 84.

<sup>183</sup> *Burgess v. Equitable L. Ins. Co.*, 126 Mass. 70; 30 Am. Rep. 654.

<sup>184</sup> *Home Ins. Co. v. Favorite*, 46 Ill. 263.

<sup>185</sup> *State v. Conklin*, 34 Wis. 21.

<sup>186</sup> *Gabay v. Lloyd*, 3 Bing. 793; 1 Duer on Insurance, ed. 1845, 264.

See further as to when custom or usage is admissible, secs. 84, 120, herein, and chapters on Seaworthiness, Duration, Risk, and Premium.

**§ 259. Evidence of Usage, When Inadmissible—Cases.—**

The following cases illustrate when usage is inadmissible: Thus, a local custom as to the materiality of an undisclosed fact respecting the risk is inadmissible, unless it is communicated to the insured or is of such a character that a presumption of knowledge thereof attaches thereto;<sup>187</sup> nor is evidence admissible of a usage in New York to give the insurer notice when anything is done by the assured to increase the risk.<sup>188</sup> So the usage of a company to require particular proof of loss does not bind the insurer where not known to him,<sup>189</sup> and no law or usage requires the assured to have his house, if untenanted, guarded by a keeper.<sup>190</sup> So a usage in a particular mill or locality to keep a watchman over Sunday is inadmissible where the policy is unambiguous.<sup>191</sup> In estimating a loss under an open policy of marine insurance evidence of the usage of a particular port is inadmissible to vary the rule that the damages are to be based on the market value of the goods at the inception of the risk and not on the invoice price.<sup>192</sup> Where by the terms of a policy a vessel was insured "to a port in Cuba, and at and thence to a port of advice, and discharge in Europe," and the vessel was lost in going from the port of discharge in Cuba to another port in the same island for reloading, it was held, in a suit on the policy for a loss, that evidence by the assured was inadmissible to show a usage that vessels going to Cuba might visit at two ports, one for discharge and another for loading.<sup>193</sup> So "the usage or custom of a particular port in a particular trade is not such a custom as the law contemplates to limit or control or qualify the construction of contracts of insurance";<sup>194</sup> and evidence is inadmissible of an alleged custom of insurance com-

<sup>187</sup> *Hartford etc. Ins. Co. v. Harmer*, 2 Ohio St. 452; 59 Am. Dec. 634.

<sup>188</sup> *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y.), 632.

<sup>189</sup> *Taylor v. Ætna L. Ins. Co.*, 13 Gray (Mass.), 434, per Metcalf, J.

<sup>190</sup> *Loye v. Merchants' Ins. Co.*, 6 La. Ann. 761.

<sup>191</sup> *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19; 54 Am. Dec. 19; *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 302.

<sup>192</sup> *Warren v. Franklin Ins. Co.*, 104 Mass. 518.

<sup>193</sup> *Hearne v. Marine Ins. Co.*, 20 Wall. (U. S.) 483.

<sup>194</sup> *Rogers v. Mechanics' Ins. Co.*, 1 Story (C. C.), 603, per Story, J. See remarks hereon in 1 Phillips on Insurance, 3d ed., sec. 140.

panies, claimed to have been known to plaintiff's agent, that upon the happening of a future event the policy should be void, said condition not having been inserted in the policy.<sup>195</sup> Nor is evidence admissible of a custom that when insurance is made on goods with a particular mark, those goods, so marked, must be on board, in order to charge the underwriter with the loss;<sup>196</sup> and there is no law or usage that requires the master of a vessel to accept a general average bond in place of the cargo, after the adjustment of loss has been completed.<sup>197</sup> Nor does the length of time a vessel may wait to take in her cargo without discharging the underwriters depend on the usage of the trade.<sup>198</sup> And it is not competent to prove a custom that notice to a broker by the agent of the company should operate to cancel a policy. So held in an action against the agent by the principal seeking recovery for a loss paid by the company which occurred after it had directed the agent to cancel.<sup>199</sup> So held, also, where notice of cancellation was given to the local agent.<sup>200</sup> A particular usage of insurance companies with respect to risks on grain in elevators does not bind the insured in the absence of proof of knowledge on his part,<sup>201</sup> and where the insurance was upon a boat lying at a wharf in the Ohio river, evidence is not admissible of a custom to remove such boats to the ice harbor, some miles distant, for safety during the season of moving ice.<sup>202</sup> Where goods claimed to have been damaged by perils of the sea were landed on their arrival at New York, before a survey by the wardens of the port, a usage at that port is inadmissible to prove the liability of the master for damages sustained by goods delivered by him to the owner or con-

<sup>195</sup> *Candee v. Citizens' Ins. Co.*, 4 Fed. Rep. 143, citing *Patridge v. Insurance Co.*, 15 Wall. (U. S.) 573; *Oelrichs v. Ford*, 23 How. (U. S.) 49.

<sup>196</sup> *Ruan v. Gardner*, 1 Wash. (C. C.) 145.

<sup>197</sup> *The Water Witch's Cargo*, 29 Fed. Rep. 159.

<sup>198</sup> *Oliver v. Maryland Ins. Co.*, 7 Cranch (U. S.), 487.

<sup>199</sup> *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290.

<sup>200</sup> *Hodge v. Security Ins. Co.*, 33 Hun. (N. Y.), 583.

<sup>201</sup> *Pettit v. State Ins. Co.*, 41 Minn. 299; 43 N. W. Rep. 378.

<sup>202</sup> *Franklin Ins. Co. v. Humphrey*, 65 Ind. 349; 32 Am. Rep. 78.

signee, unless there had been such survey, and a finding by the wardens that the goods had been stowed properly and were damaged by the perils of the sea, and that by a similar usage as between assurers and assured the survey so made must be produced, in order to charge the assurer, and that the preliminary proof is deemed insufficient unless the survey is exhibited as a part of it.<sup>203</sup> In a suit upon a policy of insurance to recover for a loss, where there is no question as to the rates of insurance charged and paid by the insured, evidence of the custom or usage of insurance companies as to the rates is immaterial.<sup>204</sup>

<sup>203</sup> Rankin v. American Ins. Co., 1 Hall (N. Y.), 619.

<sup>204</sup> King v. Enterprise Ins. Co., 45 Ind. 43.

## CHAPTER X.

### THE POLICY—ALTERATION AND MODIFICATION.

- § 265. Material alteration without consent avoids contract.
- § 266. Immaterial alteration does not avoid contract.
- § 267. Alteration when contract is inchoate.
- § 268. Alteration by a third party.
- § 269. Alteration by the insurer.
- § 270. Material alterations may be made by consent.
- § 271. Same subject: Decisions.
- § 272. Alteration of contract by parol.
- § 273. Same subject: Decisions.
- § 274. Alteration with intent to obtain insurer's consent.
- § 275. Same subject: Decisions.
- § 276. Alteration: Substitution of parties.

§ 265. **Material Alterations Without Consent Avoids Contract.**—If a completed contract of insurance is altered in any material part without the consent of the parties thereto, such alteration makes the entire contract void.<sup>1</sup> What constitutes a material alteration is a question of much importance. If the words are introduced into the body of the policy and increase the risk, they are certainly material, and in consequence nullify the contract;<sup>2</sup> and we apprehend that any alteration would be material which would operate to so change the risk or subject matter as to make the policy essentially variant in terms from that intended by the parties at the time of its completion, and words which would legally effect this result wherever written, whether on the margin of the policy or elsewhere, constitute a material alteration,<sup>3</sup> for the nec-

<sup>1</sup> *Langhorne v. Cologan*, 4 Taunt. 330; 1 Duer on Insurance, ed. 1845, 78, sec. 24, et seq.; *Chitty on Contracts*, 7th Am. ed., 783-85, notes; *Fairlie v. Christie*, 7 Taunt. 416.

<sup>2</sup> *Forshaw v. Chabert*, 3 Brod. & B. 158.

<sup>3</sup> Mr. Duer (1 Duer on Insurance, ed. 1845, 81) asserts that words on the margin, if material, avoid the policy. See, also, 1 Parsons on Insurance, ed. 1868, 138, note 1. See *Forshaw v. Chabert*, 6 Moore, 386.

essary result of a material alteration is to substitute a new contract in place of the old, which can be legally effected only with the insurer's consent under an original agreement or by subsequent ratification, or through a court of proper and competent jurisdiction.<sup>4</sup>

**§ 266. Immaterial Alteration does not Avoid Contract.**—If the alteration adds nothing to the contract nor detracts therefrom, and makes it none the less the contract legally contemplated by the parties at the time of its completion, the alteration is immaterial, and while a policy of insurance is an instrument of much solemnity, even where not under seal, its alteration in an immaterial point does not affect its validity.<sup>5</sup> So if the law would imply the words added, they do not operate to annul the contract,<sup>6</sup> and where the words "and trade" were inserted in the policy, they were held immaterial, in view of the fact that the policy as it stood before the alteration gave by implication a power to trade.<sup>7</sup>

**§ 267. Alteration When Contract is Inchoate.**—Where the alteration is material, and is made before subscription while the contract is in fieri, it does not vitiate the policy,<sup>8</sup> for when

<sup>4</sup> See 1 Marshall on Insurance, ed. 1810, 343.

<sup>5</sup> Sanderson v. McCullom, 4 Moore, 5; Nichols v. Johnson, 10 Conn. 192; Sanderson v. Symonds, 1 Brod. & B. 426; Pequamket Bridge v. Mathes, 8 N. H. 139; Hunt v. Adams, 6 Mass. 519. "But in a simple contract which is merely evidence of a promise, an immaterial alteration, however made, not at all affecting the terms of the promise, seems not to be within the same principle of deeds which from the alteration may not be the deeds of the parties, while a similar alteration in a written simple contract might leave it complete evidence of the same contract": *Id.*, per Parsons, C. J. "When the alteration is wholly immaterial, . . . the assent of the underwriters is wholly unimportant. Those who assent are bound by the policy as altered; those who dissent, by its original form, but the liability in both classes is precisely the same, and the distinction between the two contracts, where a suit is commenced, consists, not in the nature and extent of the relief, but solely in the form of declaring": 1 Duer on Insurance, ed. 1845, 80. See 1 Parsons on Marine Insurance, ed. 1868, 140.

<sup>6</sup> Hunt v. Adams, 6 Mass. 519; 1 Greenleaf on Evidence, sec. 567.

<sup>7</sup> Sanderson v. Symonds, 1 Brod. & B. 426; 4 Moore, 42.

<sup>8</sup> Robinson v. Tobin, 1 Stark. 336, per Lord Ellenborough.



the contract is imperfect and inchoate the assured, by preventing the inception of the risks, may prevent it from becoming operative and in effect dissolve it, but in no other case can he release himself by his own act from his own obligations.<sup>9</sup>

**§ 268. Alteration by a Third Party.**—If the alteration be made by a third person without the consent, co-operation, or privity of the insured, or without his being responsible therefor, it does not invalidate the policy.<sup>10</sup>

**§ 269. Alteration by Insurer.**—It is held in a Massachusetts case<sup>11</sup> that an alteration of the policy by an agent of the company who made a certain indorsement thereon, which was not agreed to by the parties and which would have operated to prevent a recovery, did not affect the contract, but that such alteration was void. And in a Delaware case<sup>12</sup> it was held that the terms of the contract were not affected by an indorsement on the policy made by the secretary of an insurance company at the request of the insured, whereby the insurance was transferred from the goods in a building to the building itself. But when alterations are accustomed to be made by the president or secretary, an alteration made by either is valid.<sup>13</sup> And where an alteration is made in the terms of the policy by a clerk of an insurance company, and he enters the same in the record-book, sufficient notice thereof is thereby given the company.<sup>14</sup>

**§ 270. Material Alteration of Policy may be Made by Consent.**—There is no doubt but that the parties may make such lawful alterations and modifications as they wish of contracts of insurance which have been completed between

<sup>9</sup> Langhorn v. Cologan, 4 Taunt. 330; 1 Duer on Insurance, ed. 1845, 82, sec. 27.

<sup>10</sup> Langhorn v. Cologan, 4 Taunt. 330; Rees v. Overbaugh, 6 Cow. (N. Y.) 746; Jackson v. Malin, 15 Johns. (N. Y.) 293, per Platt, J.; Nichols v. Johnson, 10 Conn. 192.

<sup>11</sup> Kennebec Co. v. Augusta Ins. etc. Co., 6 Gray (Mass.), 204.

<sup>12</sup> Hoffecker v. New Castle Co. Mut. Ins. Co., 5 Del. 101.

<sup>13</sup> Warren v. Ocean Ins. Co., 16 Me. 439; 33 Am. Dec. 674.

<sup>14</sup> Washington Ins. Co. v. Dawson, 30 Md. 91. See sec. 272, herein, on alteration by parol.

them. Such alterations or modifications may be made by indorsements on the policy, either marginal, or on its back, or by inserting words in the body of the instrument, or by a separate paper, or orally.<sup>15</sup>

§ 271. **Same Subject—Decisions.**—Almost any change as to parties or terms may be made by indorsement with consent.<sup>16</sup> So the contract may be altered by a writing on the margin of the policy increasing the valuation,<sup>17</sup> or covering other property,<sup>18</sup> and the termini may be changed by a proper indorsement on the policy,<sup>19</sup> and an additional agreement may be made to cover certain shipments not covered by the original policy.<sup>20</sup> So a deviation from the risk assumed in the policy may be agreed upon between the parties by indorsement written across the policy, although it is not signed, where it has been the practice of the company to make alterations in the risk in this manner, and such change is recorded by the secretary.<sup>21</sup> So an indorsement may be made giving the captain authority to act as his own pilot, without prejudice to the insurance.<sup>22</sup>

§ 272. **Alteration of Contract by Parol.**—It has been held that the alteration must be of as high a nature as the contract itself, whether made by indorsement or upon a separate paper, and that it must be subscribed by the underwriters.<sup>23</sup> But the authorities are now numerous, and there is no doubt

<sup>15</sup> *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435; 4 Am. Rep. 337; *Hoffecker v. New Castle Co. Mut. Ins. Co.*, 4 Houst. (Del.) 306; *Bell v. Marine Ins. Co.*, 8 Serg. & R. (Pa.) 98; *Robinson v. Tobin*, 1 Stark. 336; 1 Phillips on Insurance, sec. 109; 1 Duer on Insurance, ed. 1845, 78, sec. 24, et seq., and see cases next section.

<sup>16</sup> *Howes v. Union Ins. Co.*, 16 La. Ann. 235.

<sup>17</sup> *Robinson v. Tobin*, 1 Stark. 336.

<sup>18</sup> *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo. 435; 4 Am. Rep. 337.

<sup>19</sup> *Bell v. Marine Ins. Co.*, 8 Serg. & R. (Pa.) 98.

<sup>20</sup> *Marx v. National M. etc. Ins. Co.*, 25 La. Ann. 39.

<sup>21</sup> *Warren v. Ocean Ins. Co.*, 16 Me. 439; 33 Am. Dec. 674. See *Kershaw v. Cox*, 3 Esp. 246.

<sup>22</sup> *Gulf of California N. & E. Co. v. State Invest. & Ins. Co.*, 70 Cal. 586; 12 Pac. Rep. 473.

<sup>23</sup> *Kaines v. Knightly*, Skin. 54.

but that in the absence of a statutory provision the parties may by consent alter, modify, or enlarge the terms of a policy of insurance by parol, for the fact that the contract is written does not prevent its change, enlargement, or continuance by a subsequent parol agreement.<sup>24</sup> So the alterations may be made by consent without a new signature,<sup>25</sup> but where the contract is required by statute to be in writing, it cannot be shown to have been altered by parol after its execution.<sup>26</sup>

**§ 273. Same Subject—Decisions.**—Where before the expiration of the policy the insured goods were removed to another story in the same building, and the insurer, knowing such fact, issued a renewal receipt and received the consideration, it was held that this was equivalent to an indorsement or assent by parol to the change of location, and was a modification of the contract.<sup>27</sup> So it was held that the policy might be changed by a subsequent parol agreement, although the policy provided that “the use of general terms, or anything less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein contained.”<sup>28</sup> So the contract may be modified by a subsequent agreement that a mill may be run all night where the policy provides otherwise,<sup>29</sup> and an oral agreement to extend the insurance in an open policy to additional merchandise may be valid, not-

<sup>24</sup> *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Hartford F. Ins. Co. v. Webster*, 69 Ill. 392, 393; *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 276; 3 Rob. (N. Y.) 232; 19 Abb. Pr. (N. Y.) 217; 4 Am. Rep. 675. “In the United States there is no restriction on the rights of the parties to alter their original contract at any time and in any manner they may deem expedient; but in England, although certain alterations are permitted to be made without the addition of a stamp, those that seem the most material, if unstamped, are wholly invalid”: 1 *Duer on Insurance*, ed. 1845, 82, sec. 28; 1 *Parsons on Insurance*, ed. 1868, 139, note. But this statement should be qualified in view of statutory provisions requiring the contract to be in writing, and perhaps in case of revenue stamp acts and provisions of charters and by-laws of mutual companies or societies.

<sup>25</sup> *Warren v. Ocean Ins. Co.*, 16 Me. 439; 33 Am. Dec. 674.

<sup>26</sup> *Mitchell v. Universal L. Ins. Co.*, 54 Ga. 289.

<sup>27</sup> *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379; 8 Am. Rep. 556.

<sup>28</sup> *Day v. Mechanics' etc. Ins. Co.*, 88 Mo. 325; 57 Am. Rep. 416.

<sup>29</sup> *North Berwick Co. v. New England F. & M. Ins. Co.*, 52 Me. 336.

withstanding the policy provides that it shall not be binding until countersigned at the general office, and there is no countersigning as respects the extension;<sup>30</sup> and notwithstanding a provision in the by-laws of an insurance company that the president shall receive applications, fix rates, and sign all policies, it may be inferred from evidence of the way in which the business of the company was actually done that the secretary had authority to make a binding oral agreement to enter an indorsement on a policy.<sup>31</sup> Where the loss is payable to the mortgagee, with a condition to be void in case of change in title or alienation, and the property is foreclosed, it may be shown that an agreement was made after the sale that the policy should stand as security for the insured's interest, and that the company would make the proper entries therefor in its books.<sup>32</sup> Where a policy was executed "upon the freight bill of a steamboat, and the boat was injured in the hull so as to lose the voyage, but the insurers and insured made a subsequent agreement "that the insurers would be bound by their policies on cargo and freight bill by a transfer of the same to another boat," it was decided that this agreement exempted the insurers from their liability as to the first boat.<sup>33</sup> In another case where there was no provision in the policy authorizing an indorsement for removal of the insured property, but the property was removed under an indorsement granting permission so to do, it was held that no action would lie under the original policy for the loss, and that the indorsement was a new and distinct contract by parol, upon which an action of covenant could not be sustained.<sup>34</sup> So an oral agreement to pay part of the amount of the insurance within a certain time, such amount to be received in full satisfaction of a claim for loss, is valid.<sup>35</sup> But where an indorsement was made giving liberty to deviate, it

<sup>30</sup> *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray (Mass.), 204.

<sup>31</sup> *Emery v. Boston M. Ins. Co.*, 138 Mass. 398.

<sup>32</sup> *Pratt v. New York Cent. Ins. Co.*, 14 Am. Rep. 304; 55 N. Y. 505; 64 Barb. 589.

<sup>33</sup> *Field v. Citizens' Ins. Co.*, 11 Mo. 50.

<sup>34</sup> *Shertzer v. Mutual F. Ins. Co.*, 46 Md. 506. See *Maryland F. Ins. Co. v. Geeslorf* 43 Md. 506.

<sup>35</sup> *Millers' Ins. Co. v. Kinneard*, 136 Ill. 199; 26 N. E. Rep. 363.

was held that parol evidence of the conversation between the parties at the time the indorsement was made was inadmissible.<sup>36</sup>

§ 274. **Alteration with Intent to Obtain Insurer's Consent.**—Where the insured makes an alteration on the policy purposing to obtain the insurer's consent thereto, and there are several underwriters, such alteration, if material, avoids the policy in respect to all such underwriters as do not consent.<sup>37</sup>

§ 275. **Same Subject—Decisions.**—Where the date when certain ships were warranted to sail was struck out and a later date inserted in the memorandum, with the purpose of getting the assent of the insurers, it was held that an underwriter was not bound who did not assent,<sup>38</sup> and where a blank was filled out in writing with the names and quantities of certain articles, so that the insurance might attach specifically thereon, it was held a material alteration, and not binding on an underwriter who did not give his assent.<sup>39</sup>

§ 276. **Alteration—Substitution of Parties.**—It was held in an early Massachusetts case<sup>40</sup> that an indorsement on

<sup>36</sup> *Seccomb v. Provincial Ins. Co.*, 10 Allen (Mass.), 305.

<sup>37</sup> *Forshaw v. Chabert*, 3 Brod. & B. 158; *Campbell v. Christie*, 2 Stark. 64; *Laird v. Robertson*, 4 Brown Parl. C. 400; *Fairlie v. Christie*, 7 Taunt. 416; 1 Duer on Insurance, ed. 1845, 79, sec. 24 et seq. In the case of an alteration made without fraudulent intent, with the purpose of obtaining the underwriter's consent, but which is not obtained, Mr. Parsons (1 Parsons on Marine Insurance, ed. 1868, 142) refers to Mr. Duer's (1 Duer on Insurance, ed. 1845, 80) statement that it avoids the policy, and also to Mr. Phillips' opposing view that it does not. But the latter (1 Phillips on Insurance, 3d ed., sec. 114, note 1), referring to Mr. Duer's criticism of the cases relied on by him, says: "I am indebted to Mr. Duer for pointing out my error in stating these two cases in my former editions." Mr. Parsons (1 Parsons on Marine Insurance, ed. 1868, 142) also says: "We doubt whether any universal rule on this subject, either in the affirmative or negative, would be accurate." But Mr. Duer (1 Duer on Insurance, ed. 1845, 80) also declares that "the distinction between the two contracts, where the suit is commenced, consists not in the nature or extent of the relief, but solely in the form of declaring."

<sup>38</sup> *Fairlie v. Christie*, 7 Taunt. 416; 1 Moore, 114.

<sup>39</sup> *Langhorn v. Cologan*, 4 Taunt. 330.

<sup>40</sup> *Merry v. Prince*, 2 Mass. 176.

the back of a policy, whereby another underwriter was substituted, was binding, although only signed by the insurance broker,<sup>41</sup> and evidence is admissible to show a substitution of another party in place of the original insured, as in case of the continuation of a partnership business by a member of the firm.<sup>42</sup> So where C. took out a fire policy, borrowed money of F., gave F. a trust deed, caused the secretary of the company to write on the policy, "loss, if any, made payable to F.," sold the property to G. subject to the trust deed, and caused an entry to be made on the company's policy register at the policy's page, "transferred to G.," and G. paid off the trust deed and received the policy from F., it was held that thereupon F.'s interest in the policy vested in G., and that the entry in the register tended to show that the company accepted G. as the insured in place of C., and not of F.<sup>43</sup> And where A. obtained a policy of fire insurance on his museum building and collections, and before the expiration of the policy he sold the insured property to B., and the acting secretary of the insurance company then indorsed on the policy the words "loss, if any, payable to" B., and afterward B. sold the museum collections, and the president of the company made an additional indorsement on the policy in the words, "this policy is hereby changed to cover chairs, benches, and furnaces, instead of museum collection, which is removed," an action being brought upon the policy it was decided that the indorsements constituted valid contracts of insurance, and that the company was liable thereon.<sup>44</sup>

<sup>41</sup> One judge dissented, and Mr. Duer (1 Duer on Insurance, ed. 1845, 145, 146) says "the propriety of the decision seems very questionable."

<sup>42</sup> Wood v. Rutland Mut. F. Ins. Co., 31 Vt. 552.

<sup>43</sup> Griswold v. American Cent. Ins. Co., 70 Mo. 654.

<sup>44</sup> Northrup v. Mississippi Val. Ins. Co., 47 Mo. 435; 4 Am. Rep. 337.

## CHAPTER XI.

### WAR—ALIEN ENEMIES.

- § 281. Effect of war generally.
- § 282. Insurances on enemies' property formerly upheld.
- § 283. Insurances on enemies' property now illegal.
- § 284. Same subject: Early decisions.
- § 285. Trading with enemy, mistake or ignorance no excuse.
- § 286. Defense of alien enemy.
- § 287. Binding force here of laws of belligerent nations.
- § 288. Alien enemies—Life insurance.
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- § 294. Who are alien enemies: Domicile.
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- § 296. Residence with intent to return.
- § 297. Change of domicile.
- § 298. Alien enemy: What is enemy's country.
- § 299. Alien enemy: Commencement and cessation of hostilities.

§ 281. **Effect of War—Generally.**—All intercourse between citizens of belligerent powers which is inconsistent with a state of war is prohibited by the law of nations. Such prohibition includes all negotiations, commerce, or trading with the enemy; all acts which will increase or tend to increase its income or resources; all acts of voluntary submission to it or of receiving its protection; also, all acts concerning the transmission of money or goods, and nullifies all contracts relating thereto. It further prohibits insurances upon trade with or by the enemy, and upon the life or lives of aliens engaged in service with the enemy; <sup>1</sup> for the subjects of one country can not be

<sup>1</sup> See *Kershaw v. Kelsey*, 100 Mass. 561; 97 Am. Dec. 124, *per the Court*; *The Rapid*, 8 Cranch (U. S.), 155; *The Julia*, 8 Cranch (U. S.), § 181, *per Story, J.*; 3 Phillips on Evidence, \*279; *The Hoop*, 1 Rob.

permitted to lend their assistance to protect by insurance the commerce or property of belligerent, alien subjects, or to do anything detrimental to their country's interest.<sup>2</sup> The purpose of war is to cripple the power and exhaust the resources of the enemy, and it is inconsistent that one country should destroy its enemy's property and repay in insurances the value of what has been so destroyed, or that it should in such manner increase the resources of the enemy or render it aid,<sup>3</sup> and the commencement of war determines, for like reasons, all trading or intercourse with the enemy which prior thereto may have been lawful.<sup>4</sup> All individuals, therefore, who compose the belligerent powers exist, as to each other, in a state of utter exclusion, and are public enemies.<sup>5</sup>

**§ 282. Insurances on Enemies' Property Formerly Upheld.**—Under the early English cases insurances on the property of alien enemies were countenanced, if not directly upheld,<sup>6</sup> and so eminent an authority as Lord Mansfield, while not distinctly affirming their validity, defended such insurances,<sup>7</sup> upon the ground, as is said by Buller, J.,<sup>8</sup> of "expedience," and for a long time neither counsel nor court raised any objection to the legality of such contracts.<sup>9</sup>

Adm. 196; *The Emulous*, 1 Gall. (C. C.) 562; *Ex parte Bousmaker*, 13 Ves. Jr. 71; 3 Kent's Commentaries, 5th ed., 238.

<sup>2</sup> *Furtado v. Rogers*, 3 Bos. & P. 198, per Lord Alvanley.

<sup>3</sup> "As marine insurance has for its object the protection of commerce and navigation, it would obviously be inconsistent with the very purposes of a maritime war to permit insurances on the shipping and trade of an enemy": 1 Arnould on Insurance, Perkins' ed. 1850, 88, \*87.

<sup>4</sup> *McStea v. Matthews*, 50 N. Y. 166, 170, per Church, C. J.; *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; 16 Johns. (N. Y.) 438. In this case the effect of war upon the intercourse of hostile states is exhaustively considered. See, also, notes on "Belligerent rights," 91 Am. Dec. 279, 280; "Contracts with alien enemies and right to sue them in our courts," 96 Am. Dec. 624-33.

<sup>5</sup> *The Rapid*, 8 Cranch (U. S.), 155, 160, per Johnson, J.

<sup>6</sup> *Henkle v. Royal Exch. Ins. Co.*, 1 Ves. Sr. 318, 320.

<sup>7</sup> *Planche v. Fletcher*, Doug. 251; *Gist v. Mason*, 1 Term Rep. 84; *Tyson v. Gurney*, 8 Term Rep. 477; 1 Duer on Insurance, ed. 1845, 419, sec. 9, 463, note 2.

<sup>8</sup> *Bell v. Gibson*, 1 Bos. & P. 845-54.

<sup>9</sup> *Eden v. Parkinson*, Doug. 732; *Plantamour v. Staples*, 1 Term



§ 283. **Insurances on Enemies' Property now Illegal.**—Certain acts of Parliament applicable to existing wars were passed in 1748<sup>10</sup> and 1792<sup>11</sup> and these acts were followed by decisions in the English courts holding unequivocally that such insurances were absolutely void, and it is now undisputed that insurances of enemies' property or of any interest therein are illegal and void.<sup>12</sup> So where the policy was on a ship from Boston to a port of discharge in Europe, it was held, in an action on the premium note, that it was avoided as an unlawful contract, it being shown that it was intended to make the voyage to an interdicted port of the United States and that the voyage was so made.<sup>13</sup>

§ 284. **Same Subject—Early Decisions.**—The following are the cases most frequently cited upon this subject by text-

Rep. 611, note. Emerigon says: "During the course of the last war, English merchants insured our goods, and thus restored to us the value of the prizes taken from us by their own cruisers. Since Frenchmen effected insurance in London for their own account, it seemed by a parity of reason that the merchants of London should be equally allowed to effect insurance in France": Emerigon on Insurance, Meredith's ed. 1850, 103.

<sup>10</sup> 21 Geo. II., c. 4.

<sup>11</sup> 33 Geo. III., c. 27.

<sup>12</sup> "The Reglement of Barcelona (Consulat, c. 341) forbids to insure the enemy's property, and declares such insurances null and void. The *Guidon de la Mer*, c. 2, art. 5, contains the same prohibition, unless, as it says, there is a safe conduct and license to trade. This also follows from the interdiction of commerce, contained in the form of declarations of war": Emerigon on Insurance, Meredith's ed. 1850, 103, c. iv, sec. 9. "By the undivided testimony of foreign jurists the rule has obtained from the earliest period that an insurance made in a belligerent country upon the property of the subjects of an opposite belligerent is void, and this rule is now sanctioned by legislative or judicial adoption in every country of Europe": 1 Duer on Insurance, ed. 1845, 417, sec. 6.

<sup>13</sup> *Russell v. De Grand*, 15 Mass. 35. See *New York L. Ins. Co. v. Clopton*, 7 Bush (Ky.), 179, 189; 3 Am. Rep. 290; *Sands v. New York L. Ins. Co.*, 50 N. Y. 626; 10 Am. Rep. 535; *The Julia*, 8 Cranch (U. S.), 181, per Story, J.; *The Rapid*, 8 Cranch (U. S.), 155; *Griswold v. Waddington*, 15 Johns. (N. Y.) 57; 16 Id. 438; *Flindt v. Waters*, 15 East, 260; *Harmon v. Kingston*, 3 Camp. 150, 152; 3 Phillips on Evidence, \*279; 3 Kent's Commentaries, 5th ed., 253; *Ex parte Bousmaker*, 13 Ves. Jr. 71; *Potts v. Bell*, 8 Term. Rep. 548, 561; *The Emulous*, 1 Gall. C. C. 563, per Story, J.

writers and the courts: In *Brandon v. Curling*<sup>14</sup> insurance was made during peace on goods on board a neutral ship from London. The consignees were French subjects, residing at Bayonne. Although the ship left port at London one day before war was declared, yet it stopped at Gravesend for papers, and did not leave there until two days later. The goods were seized at a port in Spain by Spanish officers and condemned. It was held that no recovery could be had for the loss, thus determining that a prior legal insurance on such property is made void by war supervening between the attachment and termination of the risk. *Kellner v. Le Mesurier*<sup>15</sup> was a case of a foreign ship and British capture, where the insurance was held void, since it would be repugnant to state interests for a British subject to insure against British capture. In *Potts v. Bell*,<sup>16</sup> there was a war between Holland and Great Britain. The goods were purchased in Holland on account of British merchants, resident in England, and shipped on a neutral vessel. It was held that trading with the enemy without the King's license was illegal in British subjects, and the insurance was wholly void. In *Bristow v. Towers*,<sup>17</sup> the parties were alien enemies when the policy was effected and at the commencement of the voyage. The judgment was for defendant upon the ground that action could not be sustained by or in favor of alien enemies. In *Bradon v. Nesbitt*<sup>18</sup> the parties were alien enemies at the inception of the voyage, and were residing in France, then at war with England. The court decided that an alien enemy could not sustain an action. In *Furtado v. Rodgers*,<sup>19</sup> the insurance was on a French ship during peace. The ship was seized in a war between England and France, and was condemned by the British government. Suit was brought after peace was restored, and the insurance was held not valid against British capture. In *Gamba v. Le Mesu-*

<sup>14</sup> 4 East, 410.

<sup>15</sup> 4 East, 396.

<sup>16</sup> 8 Term Rep. 548.

<sup>17</sup> 6 Term Rep. 35.

<sup>18</sup> 6 Term Rep. 23.

<sup>19</sup> 3 Bos. & P. 191.

<sup>20</sup> 4 East, 407.

rier<sup>20</sup> insurance was effected during peace on a French ship and goods. This was a case of British capture after hostilities commenced between England and France, and suit was brought after peace was restored, and the underwriter was held not liable.

§ 285. **Trading with Enemy—Mistake or Ignorance no Excuse.**—Mistake or ignorance is not a valid excuse for trading with the enemy.<sup>21</sup>

§ 286. **Defense of Alien Enemy.**—Although the illegality of such insurances is a valid defense,<sup>22</sup> the defense of alien enemy is not favored in law,<sup>23</sup> and it is held in *Hume v. Providence and Washington Insurance Company*<sup>24</sup> that although an alien may not own a vessel under pain of forfeiture, yet if he does own one, and insures it, and it is lost, the insurance company cannot set up his alienage as a bar to an action for the insurance money, and that it must be specially pleaded as a defense. It cannot be availed of where the fact of alienage merely falls out casually during the trial, and a plea that when a promissory note sued on was made, the plaintiff was a citizen of Minnesota and the defendant a citizen of Arkansas aiding the rebellion and public enemies of the United States was held good.<sup>25</sup>

§ 287. **Binding Force Here of Laws of Belligerent Nations.**—It is declared by an eminent jurist that the prize law of the British empire became our prize law after our separation so far as adapted to us;<sup>26</sup> and it is also said that the general doctrines applicable to subjects of belligerent nations were applicable to the late civil war between the north and the south so far as warranted.<sup>27</sup>

<sup>21</sup> *The Compté de Wohronzoff*, 1 C. Rob. 206.

<sup>22</sup> *Griswold v. Waddington*, 16 Johns. (N. Y.) 488; 15 Johns. 57.

<sup>23</sup> *Shepeler v. Durant*, 14 Com. B. 582; *Society etc. Wheeler*, 2 Gall. (C. C.) 105, 127, per Story, J.

<sup>24</sup> 23 S. C. 190.

<sup>25</sup> *Rice v. Shook*, 27 Ark. 137; 11 Am. Rep. 783.

<sup>26</sup> *Thirty Hogsheads Sugar v. Boyle*, 9 Cranch (U. S.), 198, per Marshall, C. J.

<sup>27</sup> Prize cases, 2 Black (U. S.), 635. See sec. 1, preliminary chapter generally, as to how far binding are the decisions of other countries.

§ 288. **Alien Enemies—Life Insurance.**—Such insurances are not only invalid in respect to maritime risks, but it is also held that the life of an alien enemy cannot be insured by his creditor,<sup>28</sup> and if the insured engages in hostilities against his country, the policy is thereby voided.<sup>29</sup> So where the insured was post-quartermaster in the confederate service, it was held that the policy was invalidated.<sup>30</sup> In another case an insurance on the life of a person who went below a certain parallel fixed in the policy as the limit, and served on the staff of several confederate generals, was held voided thereby. The policy contained a condition that the party should not enter military service, and the court declared that it would not impose upon the party the necessity of producing a commission to prove military service, and that the moment the party connected himself in any way with the belligerent service the policy became void, or even when he became a member of the belligerent government;<sup>31</sup> and it would necessarily follow that death in battle in the enemy's service would have like effect.<sup>32</sup> It is said by the court in the case of *New York Life Insurance Company v. Clopton*<sup>33</sup> that in case of a neutral, even though his domicile would make him a technical enemy, the hostility does not subject his life, like his estate, to peril, and no belligerent right is affected by the continued validity of a life insurance, and that neither authority nor principle would avoid the policy;<sup>34</sup> and that a policy insuring property exempted by law from a belligerent power would not be avoided, but that a policy insuring the life of an actual enemy of the government would be invalid. The court also said that it would be "a

<sup>28</sup> See *Sands v. New York L. Ins. Co.*, 50 N. Y. 626, 635; 10 Am. Rep. 535. See note, "Civil war, effect of upon" life insurance, 9 Am. Rep. 169.

<sup>29</sup> *Hamilton v. Mutual L. Ins. Co.*, 9 Blatchf. (C. C.) 234, 249; *Sands v. New York L. Ins. Co.*, 50 N. Y. 626, 635; 10 Am. Rep. 535.

<sup>30</sup> *Drillard v. Manhattan L. Ins. Co.*, 44 Ga. 119; 9 Am. Rep. 164.

<sup>31</sup> *Mitchell v. Mutual L. Ins. Co. of N. Y. (Md.)*, cited in *Bliss on Life Insurance*, 699.

<sup>32</sup> *Bliss on Life Insurance*, ed. 1872, sec. 407, citing *Ex parte Lee*, 13 Ves. Jr. 64.

<sup>33</sup> 7 Bush (Ky.), 179, 188; 3 Am. Rep. 290.

<sup>34</sup> *Citing Keir v. Andrade*, 6 Taunt. 504.

grave question whether the implied condition as to perils of the war should be extended beyond the belligerent right of capture or destruction by the government of the insurer, and to that extent only we may admit that the continuation of the policy during war would be illegal and its pre-existing obligation become avoided."

§ 289. **Effect of War on Pre-existing Valid Contract.** The effect of war between the countries of the assured and insured upon a pre-existing valid contract is a question upon which there is a decided conflict of authority. It is held in England that in such cases, if loss happens during the war, this discharges the insurer from all liability therefor, but that the contract is not thereby made totally void, and a liability exists, capable of enforcement, when peace ensues, for losses on such contract arising before the war.<sup>35</sup> So Lord Ellenborough<sup>36</sup> declares that policies of this kind must be considered to have incorporated therein, as a part thereof, a provision that "this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer," and that during the continuance of the war such contracts are illegal and void.<sup>37</sup> It is declared by Washington, J., in *Gray v. Sims*,<sup>38</sup> that "if the contract be legal when it is made, and the performance of it is rendered illegal by a subsequent law, the parties are both discharged from its obligations. The insured loses his indemnity and the insured his premiums."<sup>39</sup> While in *Furtado v. Rodgers*<sup>40</sup> it was said that since the contract was legal in its inception, there should be no return of the premium. In the case of *New York Life Insurance Company v. Clopton*<sup>41</sup> the court argues that

<sup>35</sup> *Flindt v. Waters*, 15 East, 260, 265, per Lord Ellenborough; 1 Duer on Insurance, ed. 1845, 444, sec. 45. See 11 Am. Law Rev. 221.

<sup>36</sup> *Brandon v. Curling*, 4 East, 410.

<sup>37</sup> See *Furtado v. Rodgers*, 3 Bos. & P. 191; *Gamba v. Le Mesurier*, 4 East, 407. The facts to the cases cited in this and the last note are briefly noticed in sec. 284, herein.

<sup>38</sup> 3 Wash. C. C. 276.

<sup>39</sup> See *Leathers v. Commercial Ins. Co.*, 2 Bush (Ky.), 296; 92 Am. Dec. 483.

<sup>40</sup> 3 Bos. & P. 191, per Lord Alvanley.

<sup>41</sup> 3 Am. Rep. 290; 7 Bush (Ky.), 179.

"both principle and policy would have dissolved a contract made before the war for 'continuing performance,' such as partnership or affreightment," and that "insurance is a contract *sui generis*, governed by a peculiar and rather arbitrary code of the modern common law. . . . Its character, however, is so far matured and established as to distinguish it essentially from ordinary commercial contracts, and especially in the effect of war, on its pre-existing validity, which the war, as a general rule, destroys, whether the contract belong to the category of 'continuing performance' or not." And it is held in a Virginia case<sup>42</sup> that assessments by a mutual assurance society, chartered under the laws of Virginia and located within the enemy's lines during the Civil War to pay for losses incurred during the war, can create no liability upon property insured in the company located in loyal territory.

**§ 290. Same Subject—Loss Before War.**—If a contract of insurance is otherwise valid, it would seem that war merely suspends the right of action where the loss and the right to a remedy accrues before the commencement of the war.<sup>43</sup>

**§ 291. Same Subject—That War Merely Suspends the Contract.**—Mr. Duer,<sup>44</sup> after an exhaustive review of the cases, says: "There are doubtless many contracts of which a war suspends the existence without dissolving the obligation. The distinction is probably this: a vested right under a subsisting contract is not effected by a subsequent war, but where the contract is executory, and would have been illegal if made in time of war, it becomes so from the time that hostilities commence, as to all acts to be performed by either party during the war." Mr. Arnould<sup>45</sup> declares that if the policy be effected before and the loss occurs after hostilities, the assured can-

<sup>42</sup> *Mutual Assur. Soc. v. Berkeley Co.*, 4 W. Va. 343.

<sup>43</sup> *Semmes v. City F. Ins. Co.*, 6 Blatchf. 445; 13 Wall. (U. S.) 158; *Flindt v. Waters*, 15 East, 266; Chitty on Contracts, 7th Am. ed., 182, note.

<sup>44</sup> 1 Duer on Insurance, ed. 1845, 478.

<sup>45</sup> 1 Arnould on Insurance, Perkins' ed., 1850, 91, 92; 1 Id., Mac-lachlan's ed. 1887, 135.

not sue upon it, even after the return of peace,<sup>46</sup> but where the loss occurs before war commences, the right to sue is only suspended.<sup>47</sup> Both Mr. May and Mr. Parsons<sup>48</sup> adopt the language of the court in *New York Life Insurance Company v. Clopton*.<sup>49</sup> While Mr. Bacon<sup>50</sup> relies principally upon the doctrine of the case of *New York Life Insurance Company v. Statham*,<sup>51</sup> which holds that if a policy is conditioned to be void upon nonpayment of the annual premium, a failure to pay such premium subjects the policy to forfeiture if the assurer insists upon the condition, even though such failure to pay be caused by the intervention of war between territories in which the insurance company and the assured respectively reside, and which makes it unlawful for them to hold intercourse, but in such case the insured is entitled to the equitable value of the policy arising under the premiums actually paid. This equitable value is the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy when the forfeiture occurred, and may be recovered in an action at law or a suit in equity. The average rate of mortality is the fundamental basis of life insurance, and as this is subverted by giving to the assured the option to revive their policies or not after they have been suspended by a war (since none but the sick and dying would apply), it would be unjust to compel a revival against the company.<sup>52</sup> In *Spratley v. Mutual Benefit Life Insurance Company*,<sup>53</sup> a citizen of Virginia, who had insured his life in 1860 in a New Jersey company, died at Petersburg, Virginia, in 1863. In 1872 his widow presented proof of the death to the agent of the company at Louisville, Kentucky, and demanded payment, and instituted suit in 1873, and it was held that no-

<sup>46</sup> Citing *Flindt v. Waters*, 15 East, 266.

<sup>47</sup> Citing *Gamba v. Le Mesurier*, 4 East, 407.

<sup>48</sup> 1 May on Insurance, 3d ed., secs. 39, 39 s

<sup>49</sup> 7 Bush (Ky.), 179; 3 Am. Rep. 290. Quoted in the text herein in sec. 239, and also in this section.

<sup>50</sup> Bacon's Benefit Societies and Life Insurance, sec. 356.

<sup>51</sup> 93 U. S. (3 Otto) 24.

<sup>52</sup> See, also, *New York L. Ins. Co. v. Davis*, 95 U. S. 425.

<sup>53</sup> 11 Bush (Ky.), 443.

tice and proof of the death should have been made and payment demanded within a reasonable time after the close of the late war—by January 1, 1866—and a suit thereon, either in Virginia or New Jersey, was barred by limitation; that the policy, being payable in New Jersey, was governed by the laws of that state as to limitation. In *Worthington v. Charter Oak Life Insurance Company*<sup>54</sup> a policy was taken out in 1854 by a husband upon his own life for the benefit of his wife. The insuring company was located in Connecticut. The insured was located in South Carolina when the policy was effected, and continued to reside there until his death, and the insurance was made through a local agent residing in the latter states. Premiums were paid to the agent until 1860, when he was withdrawn, and premiums were then remitted to the company in Connecticut. From 1862 to 1865 no premiums were paid, owing to the war and the President's proclamation forbidding intercourse between citizens of the loyal and confederate states. At the close of the war the insured tendered the premiums with interest, which were refused and liability on the policy denied by the company. No further premiums were ever paid. In 1869 the insured died, and it was held that the company was not liable. In *Cohen v. New York Mutual Life Insurance Company*<sup>55</sup> it was decided that a contract of life insurance between citizens of different states, lawful in its inception, and upon which large sums of money have been paid for premiums, is not dissolved by war between the states. The contract remains. The remedy simply is suspended, but revives with the return of peace. In another New York case the court held that vested rights under subsisting contracts are not affected by a subsequent war, except so far as relates to the remedy which is suspended during its continuance, but where the contract is executory, and would have been illegal if made in time of war, it becomes so from the time that hostilities commence as to all acts to be performed by either party during the war.<sup>56</sup>

<sup>54</sup> 41 Conn. 372; 19 Am. Rep. 495. Two judges dissented upon this point.

<sup>55</sup> 50 N. Y. 610; 10 Am. Rep. 522, and note, 535.

<sup>56</sup> *Sands v. New York L. Ins. Co.* (N. Y. Sup. Ct. 1871), 4 Alb. L. J. 11; 50 N. Y. 626; 10 Am. Rep. 535.



In a Virginia case<sup>57</sup> the court declares that "if the contract is partly executed, and rights under it have vested, and it cannot be dissolved without the loss or forfeiture of one of the parties, and cannot be carried into execution consistently with the duties of the parties to their countries respectively while the war lasts, in such case it should not be dissolved, but only suspended. But if it can be carried into execution notwithstanding the war, without conflicting with the obligations of allegiance of either party, it will be neither dissolved nor suspended." In this case the insurance was obtained through the agent of the company at Richmond, and the premiums subsequent to the first were there paid to the agent, and the premium for 1862 was tendered him, but he refused to receive it, and the insured died in that year, and it was held by the supreme court of Virginia, two judges dissenting, that the policy was not forfeited, but that the company must pay the sum insured, less the amount of unpaid premiums, and the court proceeded upon the theory that the insured had become vested with a right by the payment of premiums, not for a year, but for life, and that no new contract was necessary each year, but only the annual payment of premiums. While in the Kentucky case already referred to<sup>58</sup> it is said that "where a single act, such as the payment of a debt would perform a contract made before the war, a belligerent policy interdicted it, because it might aid the enemy in the prosecution of hostilities, consequently suspension of performance until the restoration of peace would effectuate the whole aim of the law, without dissolving the contract, which may be ultimately enforced in perfect consistency with the principle and end of the temporary interdict. In that class of cases it is the contract, and not the performance, that is continuing, and a suspension of remedy, and not a dissolution of the contract, is all that is necessary, befitting, and just. But in such cases as partnership or affreightment the performance is continuing and unremitting until the end of the con-

<sup>57</sup> *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614, 635; 3 Am. Rep. 218.

<sup>58</sup> *New York L. Ins. Co. v. Clopton*, 7 Bush, 179, 184; 3 Am. Rep. 290.

tract shall have been consummated, and, therefore, as supervening war between the parties disables them from performing any of the incumbent duties and defeats the object of the contract, a dissolution of the contract is the natural and legal effect of the war." The conclusion from these cases and opinions, and from other cases cited hereafter, would seem to be that where a right has vested under the contract, then a supervening war merely suspends the remedy; but where the loss happens during the war and under a pre-existing valid contract of insurance, then if merely suspending the contract or its enforcement is within the reason and policy of the law, and would effectuate its whole aim and purpose, it will only be suspended, and not dissolved. Such a rule would not appear to be inconsistent with the reason of the rule, which prohibits all insurances of alien enemies, or their property, although it will be noted that nearly all the decisions relating to the Civil War are those pertaining to life risks, which from their very nature are of longer duration than marine and fire risks. Although in many cases these contracts of life insurance have been held to be contracts from year to year and voidable for nonpayment of premiums.<sup>59</sup>

<sup>59</sup> See *Dillard v. Manhattan L. Ins. Co.*, 44 Ga. 119; 9 Am. Rep. 167 (that war merely suspended). See *Ex parte Bousmaker*, 13 Ves. Jr. 71; *Saltus v. United States Ins. Co.*, 15 Johns. (N. Y.) 523; *Connecticut Mut. L. Ins. Co. v. Duerson*, 28 Gratt. (Va.) 630; *Cohen v. Mutual L. Ins. Co.*, 50 N. Y. 610; 10 Am. Rep. 522; *Bell v. Chapman*, 10 Johns. (N. Y.) 183; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; 10 Am. Dec. 200; *Clement v. New York L. Ins. Co.*, 76 Va. 355; *Hillyard v. Mutual B. L. Ins. Co.*, 35 N. J. L. 415; *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614; 3 Am. Rep. 218; *Mutual B. L. Ins. Co. v. Hillyard*, 18 Am. Rep. 741; 37 N. J. L. (8 Vroom.) 444; *United States v. Willey*, 11 Wall. (U. S.) 508; *Martini v. International L. Assur. Soc.*, 53 N. Y. 339; 13 Am. Rep. 529; *Mutual B. L. Ins. Co. v. Atwood*, 24 Gratt. (Va.) 497; 18 Am. Rep. 652; *Sands v. New York L. Ins. Co.*, 50 N. Y. 626; 10 Am. Rep. 535, 539; *Statham v. New York L. Ins. Co.*, 45 Miss. 581; 7 Am. Rep. 737; *New York L. Ins. Co. v. Clopton*, 7 Bush (Ky.) 179; 3 Am. Rep. 290; *New York L. Ins. Co. v. Hendren*, 24 Gratt. (Va.) 536; contra, *New York L. Ins. Co., v. Stathen*, 93 U. S. 24; *Dillard v. Manhattan L. Ins. Co.*, 44 Ga. 119; 9 Am. Rep. 167; *Abell v. Pennsylvania L. Ins. Co.*, 18 W. Va. 400; *Worthington v. Charter Oak L. Ins. Co.*, 41 Conn. 372; 19 Am. Rep. 495; *Tait v. New York L. Ins. Co.*, 1 Flipp. C. C. 288. See *New York L. Ins. Co. v. Davis*, 95 U.

§ 292. **Right of Citizen to Bring Property from Enemy's Country.**—It is said by the supreme court of the United States that if an American citizen residing in an enemy's country at the breaking out of the war has the right to withdraw his property acquired before the war, it must be done within a reasonable time after knowledge thereof, and with due diligence, and that a shipment made eleven months after was too late.<sup>60</sup> But this right to withdraw property was subsequently denied by the same court, with the exception where the act is done with the consent of the citizen's own government.<sup>61</sup>

§ 293. **War—License to Trade.**—Inasmuch as the power of Congress to regulate commerce between the United States and foreign nations and among the several states is general, and has no limitations except those prescribed by the constitution itself,<sup>62</sup> there is no doubt of the power of the government to authorize trading with an enemy or the protection of enemy's property, and it may grant privileges or licenses to trade.<sup>63</sup> Thus, during the Civil War the subject was regulated

S. 425. See generally, as to effect of war, Bliss on Life Insurance, ed. 1872, secs. 406-17. "No policy of insurance issued to a citizen of the commonwealth by an authorized company, organized under the laws of a foreign country, shall be invalidated by the occurrence of hostilities between such foreign country and the United States": Mass. Acts, 1887, c. 214, sec. 84.

<sup>60</sup> The St. Lawrence, 9 Cranch (U. S.), 121, per Story, J.; 1 Gall. C. C. 467. See Amory v. McGregor, 15 Johns. (N. Y.) 24.

<sup>61</sup> The Rapid, 1 Gall. (C. C.) 304; 8 Cranch (U. S.), 155; The Mary, 8 Cranch (U. S.), 621, per Story, J.; The Alexander, 8 Cranch, 169. See The Lady Jane, 1 Rob. 202; The Venus, 8 Cranch (U. S.), 253, Marshall, C. J., and Livingston, J., dissenting. See Walker's International Law, ed. 1895, 125, et seq. "I adopt the conclusion that the property of subjects withdrawing themselves in good faith from a hostile country within a reasonable time after knowledge of the war is not stamped with the illegal character of trading with an enemy, but it is to be considered, by a just exception from the general rule, as exempt from confiscation": See 1 Duer on Marine Insurance, ed. 1845, 565, sec. 11.

<sup>62</sup> Gibbons v. Ogden, 9 Wheat. (U. S.) 1.

<sup>63</sup> See The Schooner Rapid, 1 Gall. (C. C.) 295, per Story, J., who says: "It must be considered as a settled principle of maritime and national law that all trade with the enemy, unless with the permission of the sovereign, is interdicted."

by Congress, but by the act of July 16, 1861,<sup>64</sup> the President alone had power to license commercial intercourse between places within the lines of military occupation by forces of the United States and places under the control of insurgents against it. "The sovereign may license trade, but in so far as it is done it is a suspension of war and a return to the condition of peace. It is said there cannot be at the same time war for arms and peace for commerce. The sanction of the sovereign is indispensable for trade."<sup>65</sup> It is held to be of itself an illegal act to sail under an enemy's license.<sup>66</sup>

§ 294. **Who are Alien Enemies—Domicile.**—Though the term "enemies," when strictly construed, means public enemies,<sup>67</sup> the question whether a party is an alien enemy or not depends upon his domicile, rather than upon the place of his birth; for although one born out of the allegiance to the government or out of the jurisdiction of the United States, and not naturalized, may be an alien,<sup>68</sup> yet domicile is the test of an alien enemy. And if one be domiciled in a country at war with the United States, he is an alien enemy without reference to his place of birth.<sup>69</sup> And if he has resided long enough in

<sup>64</sup> See, also, Act of July 2, 1864.

<sup>65</sup> *Coppell v. Hall*, 7 Wall. (U. S.) 542, 554, per Swayne, J. See *McKee v. United States*, 8 Wall. (U. S.) 163; *Maddox v. United States*, 15 Wall. (U. S.) 58; *The Sea Lion*, 5 Wall. (U. S.) 630; *The Ouachita Cotton*, 8 Wall. (U. S.) 521; *The Reform*, 3 Wall. (U. S.) 617; *United States v. Lane*, 8 Wall. (U. S.) 185; *Butler v. Naples*, 9 Wall. (U. S.) 766; *Mitchell v. Harmony*, 13 How. (U. S.) 115; affirming 1 Blatchf. (C. C.) 549. Concerning licenses to trade, see Halleck's *International Law and Laws of War*, ed. 1861, 675; *Hall's International Law*, ed. 1880, 478, sec. 196; *Wheaton's International Law*, ed. 1863, 554, 582, 690-92; *Walker's International Law*, ed. 1895, 123.

<sup>66</sup> *Craig v. United States Ins. Co.*, Pet. (C. C.) 410; *The Ariadne*, 2 Wheat. (U. S.) 143; *The Julia*, 1 Gall. (C. C.) 594; *The Aurora*, 8 Cranch (U. S.), 203; *The Hiram*, 1 Wheat. (U. S.) 140; *Maisonnaire v. Keating*, 2 Gall. (C. C.) 325; *The Julia*, 8 Cranch (U. S.), 181; *The Langdon Cheves*, 4 Wheat. (U. S.) 103. See *Walker's International Law*, ed. 1895, 115.

<sup>67</sup> *Monongahela Ins. Co. v. Chester*, 43 Pa. St. 491.

<sup>68</sup> See note "Who are aliens," 84 Am. Dec. 210-13.

<sup>69</sup> *The Venice*, 2 Wall. (U. S.) 58; *Sloop Charter*, 2 Dall. (C. C.) 41; *The Venus*, 8 Cranch (U. S.), 253; *Willeson v. Patterson*, 7 Taunt. 438; *United States v. Farragut*, 22 Wall. (U. S.) 406; *The Schooner Edward*

the enemy's country to acquire a domicile there, he is subject to all the disabilities of an enemy with relation to his property.<sup>70</sup> A partnership between parties domiciled in Savannah and New York was held dissolved by the Rebellion.<sup>71</sup> But it is decided that securities held by a citizen and resident of New York prior to the Civil War upon a resident of North Carolina, could not be extinguished *durante bello*, either through the agency of the courts there or through the former agents and attorneys of such nonresident.<sup>72</sup> The residence of a consul or minister in a foreign country, on account of his official duties in such capacity, does not change his domicile,<sup>73</sup> but if he engages in mercantile business in such foreign country, the trade is affected by the hostile character of the country.<sup>74</sup> But the consul of a belligerent may, it is held, engage as a merchant in the commerce of a neutral state where he resides;<sup>75</sup> and it is declared that the character of property is determined by the

Barnard, Blatchf. Pr. 122; *The Mary and Susan*, 1 Wheat. (U. S.) 46; *The Flying Scud*, 6 Wall. (U. S.) 263; *Rogers v. Schooner Amado*, Newb. Adm. 400; *The Prize cases*, 2 Black. (U. S.) 635; *Potts v. Bell*, 8 Term Rep. 548. See note "Enemies, who are," 88 Am. Dec. 779, 780; 1 Kent's Commentaries, 13th ed., 74, et seq.; Hall's International Law, ed. 180, 428, sec. 168, et seq.; Wheaton's International Law, ed. 1863, 559, 565, 573; Walker's International Law, ed. 1895, 107, sec. 40.

<sup>70</sup> *United States v. Cargo Schooner El Telegrafo*, Newb. Adm. 383; *The Frances (Gillespie's Claim)*, 8 Cranch (U. S.), 363; affirming 1 Gall. (U. S.) 614.

<sup>71</sup> *Woods v. Wilder*, 43 N. Y. 164; 3 Am. Rep. 684. See *The William Bagaley*, 5 Wall. (U. S.) 379; *The Cheshire*, 3 Wall. (U. S.) 231; *The San Jose Indiano*, 2 Gall. (U. S.) 268; *The Freundschaft*, 4 Wheat. (U. S.) 105.

<sup>72</sup> *Blackwell v. Willard*, 65 N. C. 555; 6 Am. Rep. 749.

<sup>73</sup> *Wheat v. Smith*, 50 Ark. 266; 7 S. W. Rep. 161. See *The Indian Chief*, 3 Rob. Adm. 12; *Arnold v. United Ins. Co.*, 1 Johns. Cas. (N. Y.) 363; *Bark Pioneer*, Blatchf. Pr. 666.

<sup>74</sup> *The Indian Chief (Milton's case)* 3 Rob. Adm. 12, 27, 28. Mr. Phillips (1 Phillips on Insurance, 3d ed., 114; sec. 168) says: "The commercial national character of a consul is not affected by his office, but is determined, like that of other persons, by his residence and the various other circumstances that constitute national character as affecting that of his property": Wheaton's International Law, ed. 1863, 573, sec. 19; Hall's International Law, ed. 1880, 431.

<sup>75</sup> *The Sarah Christiana*, 1 Rob. Adm. 239, per Sir Wm. Scott.

domicile of the owners.<sup>76</sup> In regard to corporations, they are now considered to be citizens of the state of their incorporation and transaction of business.<sup>77</sup> So where a foreign insurance corporation, upon compliance with the insurance laws of New York, has been authorized to do business there, and has established a permanent general agency, and conducts its business there as a distinct organization in the same manner as domestic corporations, it will be regarded, as to the business transacted there, as domiciled and subject to the same obligations and liabilities as domestic institutions.<sup>78</sup> And substantially the same ruling obtains in Ohio.<sup>79</sup> So a foreign corporation is an "inhabitant" under the first section of the Judiciary Act of that district in which it is engaged in business.<sup>80</sup> An insurance company is also an inhabitant, for the purposes of taxation, of the town where it has its principal place of business.<sup>81</sup>

**§ 295. Alien Enemy—What Constitutes Domicile.**—What constitutes domicile depends almost exclusively upon whether the party intends to remain in a given country

<sup>76</sup> *Arnold v. United Ins. Co.*, 1 Johns. Cas. (N. Y.) 363, 368, affirmed, *Jenks v. Hallett*, 1 Caines (N. Y.), 60; *The Vigilantia*, 1 Rob. Adm. 13, 14, per Sir Wm. Scott; *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.), 542, per Story, J.

<sup>77</sup> *Louisville R. R. Co. v. Lelson*, 2 How. (U. S.) 497; *Shelby v. Hoffman*, 7 Ohio St. 450; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404. But it is said by Mr. Phillips that the national character of a corporation is that of its members: 1 Phillips on Insurance, 3d ed., sec. 167; and so in Arnould on Insurance, Perkins' ed., 94, sec. 55, note 1, both citing *Hope Ins. Co. v. Boardman*, 5 Cranch (U. S.), 67; *Bank of United States v. Devaux*, 5 Cranch (U. S.), 62; *Society etc. v. Wheeler*, 2 Gall. (C. C.) 105. See *Wood v. Hartford F. Ins. Co.*, 13 Conn. 202; 33 Am. Dec. 395, note, 399; *Hatch v. Chicago etc. R. R. Co.*, 6 Blatchf. (C. C.) 105; *Minot v. Philadelphia etc. R. R. Co.*, 2 Abb. U. S. 323; *Thompson on Corporations*, ed. 1895, vol. 1, sec. 12; *Id.*, vol. vi, secs. 7421-25.

<sup>78</sup> *Martin v. International L. Ins. Soc.*, 53 N. Y. 339; 13 Am. Rep. 529.

<sup>79</sup> *New York L. Ins. Co. v. Bert*, 23 Ohio St. 105.

<sup>80</sup> *Gilbert v. New Zealand Ins. Co.*, 49 Fed. Rep. 884.

<sup>81</sup> *City of Portland v. Union Mut. L. Ins. Co. (Me.)*, 9 Atl. Rep. 613. But see *International L. Assur. Soc. v. Commissioners Taxes*, 23 Barb. (N. Y.) 318. A corporation is said not to be a citizen of the United States within the 14th amendment: *Insurance Co. v. City of New Orleans*, 1 Woods (C. C.), 85.

or state, either permanently or for a definite period, or whether his abode is taken up for a temporary purpose with the intent to return.<sup>82</sup> Thus the intent to reside an indefinite time will establish a commercial domicile.<sup>83</sup> And if a citizen of one country goes into another and remains there, and engages in trade and commerce, he becomes by the law of nations a merchant of that country and acquires a domicile there.<sup>84</sup> So British subjects residing and trading in Portugal are to be deemed Portuguese subjects.<sup>85</sup> A foreigner coming to the United States for health, and remaining and engaging in trade, acquires a domicile here.<sup>86</sup> If the domicile is acquired for mercantile purposes in the enemy's country, the person acquiring such domicile becomes an alien enemy,<sup>87</sup> for the domicile in an enemy's country is, as has been stated,<sup>88</sup> the test of hostile status. So a business in a hostile country is stamped with the national character of such country.<sup>89</sup> So if a neutral who, having resided in the hostile country, withdraws therefrom, or who, never having resided there, retains a business or trading house there, the entire commerce of the house is stamped with the hostile character of

<sup>82</sup> *Hallowell v. Saco*, 5 Greenl. (Me.) 143; *Harvard College v. Gore*, 5 Pick. (22 Mass.) 372, 374. For definition of "domicile," see note 34 Am. St. Rep. 313; *Wood v. Roeder*, 45 Neb. 311; 63 N. W. Rep. 853; *Arnold v. United Ins. Co.*, 1 Johns. Cas. (N. Y.) 366, 367, per Kent, J.; *Story's Conflict of Laws*, 7th ed., c. III, sec. 43, p. 36. "Domicile, how acquired," see note 34 Am. St. Rep. 314, and see note for definition of "domicile," 59 Am. Dec. 111-15; note: terms "inhabitaney," "residence," "citizenship," 32 Am. Dec. 427, 429.

<sup>83</sup> *The Venus*, 8 Cranch (U. S.), 279.

<sup>84</sup> *The Indian Chief*, 3 Rob. Adm. 12.

<sup>85</sup> *The San Jose Indiano*, 2 Gall. (C. C.) 293, per Story, J.; *The Friendschaft*, 3 Wheat. (U. S.) 52, per Marshall, C. J.

<sup>86</sup> *Elbers v. Union Ins. Co.*, 16 Johns. (N. Y.) 128. In this case there was a warranty in the policy that the property was Swedish, which the court held was not complied with. But see on this point, *Duguet v. Rhinelander*, 2 Johns. Cas. (N. Y.) 476; reversing 1 Johns. Cas. (N. Y.) 300.

<sup>87</sup> *McConnell v. Hector*, 3 Bos. & P. 114, per Alvanley, C. J.; *Tabbs v. Bendelack*, 4 Esp. 107; 1 Kent's Commentaries, 13th ed., 74. See, also, as to neutral engaging in enemies' commerce, *The San Jose Indiano*, 2 Gall. (C. C.) 286, per Story, J.

<sup>88</sup> See last section and cases thereunder.

<sup>89</sup> *The Friendschaft*, 4 Wheat. (U. S.) 105.

the enemy.<sup>90</sup> The intention to return at some future period to one's native country does not destroy the presumption of domicile, since if there be any doubt as to the time or certainty of the return, this will not avail against the presumption of hostile residence, or where the intention is fixed as of a definite and certain time at a period distantly removed, this is not sufficient;<sup>91</sup> and where the intent to permanently reside in the country is avowed, or where it is otherwise ascertained, it makes no difference how recently the residence may have been established, or that it may have been for only a day or two.<sup>92</sup> So the character of the trade is immaterial where the party is domiciled bona fide in the United States, intending to indefinitely reside here, although he had emigrated here from a foreign country.<sup>93</sup>

**§ 296. Residence with Intent to Return.**—Where a person's residence in a country exists only for a special or temporary purpose, with the intent to return within a short time to his own country, this does not constitute such residence his domicile, nor invest the party with a commercial character at variance with his actual domicile,<sup>94</sup> and this was held true in a

<sup>90</sup> *The Friendschaft*, 4 Whaet. (U. S.) 107; *The San Jose Indiano*, 2 Gall. (C. C.) 268.

<sup>91</sup> 1 Duer on Insurance, ed. 1845, 500, sec. 9.

<sup>92</sup> *Case of Mr. Whitehall*, cited in *The Diana*, 5 C. Rob. Adm. 60, per Sir Wm. Scott; s. c., given in 1 Duer on Insurance, ed. 1845, 496, sec. 3, as follows: "The property of a British merchant, who had removed to a Dutch island in the West Indies at a time when a war between England and Holland was expected, at the breaking out of actual hostilities, was condemned as that of an enemy, although he had resided in the island only a day or two previous to its capitulation to a British force, but he was proved to have gone there with the avowed design of forming a permanent establishment, and by this design he was held to be concluded"; and in a note thereto he refers to remarks of Chief Justice Marshall on this case in *The Venus*, 8 Cranch (U. S.), 288. See, also, 1 Kent's Commentaries, 13th ed., 76, 77.

<sup>93</sup> *Livingston v. Maryland Ins. Co.*, 7 Cranch (U. S.), 506, 542.

<sup>94</sup> See *The Harmony*, 2 C. Rob. Adm. 324; *Wheaton's International Law*, ed. 1863, 560. As to evidence generally to show change of domicile, see *Viles v. City of Walton*, 157 Mass. 542; 34 Am. St. Rep. 311.



case where the stay was prolonged sixteen months and the party intended to and did return;<sup>95</sup> and it was so held where the party was a naturalized citizen and had a commercial domicile in the United States, and was detained by business in another country over one year.<sup>96</sup> The intent to return, however, must have some limit, for it cannot absolutely govern in all cases, since the time of the continuance of the residence and the attendant circumstances may make the party's domicile that of the place where he continuously resides, although his going to and residing in another country may have been incepted in a special purpose,<sup>97</sup> for if the residence, although originating in a special purpose, be continued for a long period of time, it may be reasonably assumed that the special purpose has become affected by other purposes and designs, or that the intent of returning has been indefinitely postponed. This intent, however, depends largely upon circumstances, and is subject to some latitude of application. Thus, residing in a country shortly before and up to the beginning of war, with intent to return, should not be held binding. The party should be permitted a reasonable time to disclose his actual intention, and disengage himself, but a continuous residing in such country thereafter and identifying himself with its interests and commerce, and aiding its resources by payment of taxes, or otherwise adding to its strength as a belligerent, would establish a domicile there, against which the original special purpose ought not to avail as a defense.<sup>98</sup> But if a man is forcibly restrained and his residence is involuntary, that is not his domicile.<sup>99</sup>

<sup>95</sup> *Sears v. City of Boston*, 1 Met. (42 Mass.) 250.

<sup>96</sup> *The Ann Green*, 1 Gall. (C. C.) 274; *White v. Brown*, 1 Wall. Jr. (C. C.) 217; *The Friendschaft*, 3 Wheat. (U. S.) 51.

<sup>97</sup> See *The Harmony*, 2 C. Rob. Adm. 322, 323, per Sir Wm. Scott; *Wheaton's International Law*, ed. 1863, 560.

<sup>98</sup> *The Harmony*, 2 C. Rob. Adm. 324, per Sir Wm. Scott; *Fifty-two Bales of Cotton*, Blatchf. Pr. 644; reversing *Id.* 309; *The Brig Sarah Starr*, Blatchf. Pr. 650; *Id.* 69; *Schooner Gilpin*, Blatchf. Pr. 661; reversing *Id.* 291; *Wheaton's International Law*, ed. 1863, 560. The above is also substantially the opinion of Mr. Duer: 1 *Duer on Insurance*, ed. 1845, 489; *Tabbs v. Bendelack*, 4 Esp. 108; *The St. Lawrence*, 9 Cranch (U. S.), 120.

<sup>99</sup> *The Ocean*, 5 Rob. Adm. 84; *Bromley v. Heseltine*, 1 Camp. 77, per Lord Ellenborough.

§ 297. **Change of Domicile.**—A domicile once acquired is presumed to continue, and is retained until another is acquired.<sup>100</sup> Nor is intent alone sufficient to constitute a change in domicile. There must also be a consummation of the intention—an actual change in fact, some overt act.<sup>101</sup> And if a hostile subject goes to his native country for a temporary or special purpose, only intending to return, this does not change his character of alien enemy.<sup>102</sup> So if a domicile be once acquired the party cannot be deprived of his rights in this respect by a temporary residence in his native country.<sup>103</sup> But if the intent to abandon a foreign domicile is coupled with the fact of abandonment, as where a party leaves such domicile with the intent not to return, the acquired national character changes, and especially is this true in case of a return under such conditions to one's native country, for in such case the domicile of both attaches in transitu the instant of abandonment of the acquired foreign domicile.<sup>104</sup> But a merchant

<sup>100</sup> *State v. Adams*, 45 Iowa, 99; 24 Am. Rep. 760; *Sparenburgh v. Bannatyne*, 1 Bos. & P. 163, per Eyre, C. J.; *Arlington v. North Bridgewater*, 23 Pick. (40 Mass.) 176, per Shaw, C. J.; *Moore v. Wilkins*, 10 N. H. 456, per Parker, C. J.; *Kellburn v. Bennett*, 3 Met. (44 Mass.) 199, 201, per Wilde, J. See *Fidelity etc. Co. v. Preston*, 96 Ky. 277; 28 S. W. Rep. 658; *Wood v. Roeder*, 45 Neb. 311; 63 N. W. Rep. 853; *Mayo v. Equitable L. Assur. Soc.*, 71 Miss. 590; 15 So. Rep. 791; *Knowlton v. Knowlton*, 155 Ill. 158; 35 N. E. Rep. 595.

<sup>101</sup> *Price v. Price*, 156 Pa. St. 617; *Cadwallader v. Howell*, 8 Harr. (18 N. J. L.) 138; *Wood v. Roeder*, 45 Neb. 311; 63 N. W. Rep. 853; *Hariston v. Hariston*, 27 Miss. 704; 61 Am. Dec. 530; *Kilburn v. Bennett*, 3 Met. (44 Mass.) 199; *Otis v. City of Boston*, 12 Cush. (66 Mass.) 44; *The Clitto*, 3 Rob. Adm. 38; *The Frances*, 1 Gall. (C. C.) 614; 8 Cranch (U. S.), 335; *Ringgold v. Barley*, 5 Md. 186; 59 Am. Dec. 107, and note, 113; *Gravillon v. Richards*, 13 La. 293; 33 Am. Dec. 563, and note; *Brown v. Butler*, 87 Va. 621; *State v. Sanders*, 106 Mo. 88, and see note, 32 Am. Dec. 428.

<sup>102</sup> See *The Friendschaft*, 3 Wheat. (U. S.) 52; *The Ann Green*, 1 Gall. (C. C.) 274.

<sup>103</sup> *Wilson v. Maryat*, 8 Term. Rep. 31.

<sup>104</sup> *The Indian Chief*, 3 Rob. Adm. 12, per Sir Wm. Scott; *The Frances*, 8 Cranch (U. S.), 335; *The Joseph*, 1 Gall. (C. C.) 614; *The St. Lawrence*, 1 Gall. (C. C.) 407. See *The Gray Jacket*, 5 Wall. (U. S.) 342; *The Peterhoff*, 5 Wall. (U. S.) 28; *Story's Conflict of Laws*, 7th ed., c. iii, p. 53, sec. 48. See the dissenting opinion of Chief Justice Marshall, in *The Venus*, 8 Cranch (C. C.), 299.

must actually return to his native country with intent to remain, to overcome the hostile character arising from residence in the enemy's country, but his withdrawal from that country must be limited to a reasonable time, or delay must have proceeded from necessity or compulsion, and where the withdrawal was a long time after the war had commenced, his property was nevertheless held liable to confiscation.<sup>105</sup> The right of a naturalized citizen of this country domiciled in England to ship his property from that country after the war has commenced is distinctly denied in the United States courts in a case where such an attempt was made, although without knowledge of the war, the parties still being residents or England, the court holding that the right of such party surprised by war in the country of his domicile to make his election to return to his adopted country, or to remain in the country of his domicile and have his property protected meanwhile, was not warranted by the principles of equity or the law.<sup>106</sup> It seems to be settled in this country that a person cannot be permitted to emigrate into another country *flagrante bello*, and thereby acquire a neutral domicile which will protect his trade against the belligerent powers.<sup>107</sup>

<sup>105</sup> *The St. Lawrence*, 1 Gall. (C. C.) 471; 9 Cranch (U. S.), 120; and see cases in preceding note.

<sup>106</sup> *The Venus*, 8 Cranch (U. S.), 253, 283, Chief Justice Marshall and Mr. Justice Livingston dissented. See *Desty's Federal Citations*, 731, as to this case. See *The Rapid*, 1 Gall. C. C. 304, per Story, J.; *The Mary*, 1 Gall. (C. C.) 621; *The Lady Jane*, 1 Rob. Adm. 202; *The St. Lawrence*, 9 Cranch (U. S.), 121, per Story, J. See remarks on the decision in 1 Duer on Insurance, ed. 1845, 503-10, secs. 12, 21; 1 Arnould on Insurance, Perkins' ed. 1850, 102, and note; 1 Kent's Commentaries, 6th ed., 78; 1 Parsons' Marine Insurance, ed. 1868, 30, note 3. But see *Amory v. McGregor*, 15 Johns. (N. Y.) 24; 58 Am. Dec. 205. As to the right of a subject of one country who is not domiciled, but merely resident of a foreign country, to export thence his property after war breaks out, see 1 Duer on Insurance, ed. 1845, 561-66, secs. 9-11, and notes.

<sup>107</sup> *The Dos Hermanas*, 2 Wheat. (U. S.) 76, 98, per Story, J.; 1 Kent's Commentaries, 5th ed., 75. See *The Santissima Trinidad*, 7 Wheat. (U. S.) 284, 348, per Story, J. But see *Duguet v. Rhinelander*, 2 Johns. Cas. (N. Y.) 476; reversing 1 Johns. Cas. (N. Y.) 360; *Jackson v. New York Ins. Co.*, 2 Johns. Cas. (N. Y.) 191, overruled by last case; 1 Duer on Insurance, ed. 1845, 521.

§ 298. **What is Enemy's Country.**—We have seen that the national character of a country, whether it be hostile or neutral, determines that of its inhabitants,<sup>108</sup> and it also becomes necessary, in order to decide who are alien enemies, to determine what constitutes the enemy's country. It was said in regard to the Civil War that the enemy's territory was that south of the line of war, or, in other words, the line of demarcation claimed and held by the confederate forces,<sup>109</sup> and that "all persons residing within this territory whose property may be used to increase the revenue of the hostile power are in the contest liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies." In case of acquisitions made during war, if the country is in possession of the conqueror, and the government under his control, it thereby becomes part of his domain for every commercial and belligerent purpose;<sup>110</sup> but if such country retains its own government and civil power, it will still remain neutral.<sup>111</sup> But a mere cession by treaty is insufficient; the territory must be solemnly delivered by the ceding power.<sup>112</sup>

§ 299. **Alien Enemies—Commencement and Cessation of Hostilities.**—Whether a contract of insurance is valid and in force, or whether property is subject to condemnation on the ground of trade with the enemy, or whether a party is an alien enemy, depends upon the existence of war, and necessarily the date of the commencement and cessation of hostilities is of vital importance. It would seem, therefore, in all reason and justice to the parties concerned, that the intentions of the government should be plainly manifested, and that the fact should be

<sup>108</sup> See, also, *The Indian Chief*, 3 Rob. Adm. 12, and cases cited therein; *The Henrick and Maria*, 4 Rob. Adm. 43, 61.

<sup>109</sup> Prize cases, 2 Black (U. S.), 635.

<sup>110</sup> *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch (U. S.), 191, per Marshall, C. J.

<sup>111</sup> *Hagedorn v. Bell*, 1 Mees. & S. 450. See *The San Jose Indiano*, 2 Gall. C. C. 268, 292; *The Henrick*, 4 Rob. Adm. 43, per Sir Wm. Scott.

<sup>112</sup> 1 Duer on Insurance, ed. 1845, 437, sec. 37, citing *The Fama*, 5 Rob. Adm. 106; *The Bolleta*, 1 Ed. Adm. 171.

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so public and notorious that the presumption necessarily exists that the parties had knowledge of the existence of war, and this should satisfactorily appear to the court. In relation to the commencement of hostilities a formal declaration of war would certainly seem to fix a definite time, although such formal declaration is unnecessary.<sup>113</sup> The war of 1812 between Great Britain and this country was immediately commenced by us after the act of Congress declaring a state of war, which seems to have been deemed a formal notice, although the declaration was not formally communicated to the British government.<sup>114</sup> It is held, however, that where the declaration of war, although made, was not known at the foreign port of shipment at the time the vessel sailed and goods of a citizen were shipped thereon, and there was no opportunity to countermand the order after notice of the war, that there was no such illegality as to affect the importation,<sup>115</sup> from which it may fairly be implied that even though the declaration of war may fix a definite time, yet the rights of parties may remain unchanged when justifying circumstances exist. A state of war may exist without any formal declaration of it by either party, and this is true both of a civil and foreign war, and that a civil war exists and may be prosecuted on the same footing as if those opposing the government were foreign invaders, whenever the regular course of justice is interrupted by revolt so that the courts cannot be kept open.<sup>116</sup> Mr. Wheaton says: "A treaty of peace binds the contracting parties from the time of its signature. Hostilities are to cease between them from that time, unless some other period be provided in the treaty itself; but the treaty binds the subjects of the belligerent nations only

<sup>113</sup> See 1 Duer on Insurance, ed. 1845, 592, sec. 35. "There is no difficulty where a public declaration or manifesto precedes an actual war. The war then exists from the time it is declared": Id.

<sup>114</sup> The American minister was recalled in the early part of 1811. The declaration of war was approved by the president on June 18, 1812: See Cooper's American Politics, book v, p. 110; book i, pp. 17, et seq. But see Wheaton's International Law, ed. 1863, 532.

<sup>115</sup> The Merrimack, 8 Cranch (U. S.), 817.

<sup>116</sup> Prize cases, 2 Black (U. S.), 635. See The Brig Sally Magee, Blatchf. Pr. 379, 382. See Walker's International Law, ed. 1895, 103, et seq. See, also, references to other writers at end of this chapter.

from the time it is notified to them.”<sup>117</sup> But in the Civil War between the north and south there is some conflict of opinion both as to the time when the war commenced and when it ceased. In *Leather v. Commercial Insurance Company*,<sup>118</sup> Robertson, J., giving the opinion of the court says, referring to the proclamation of blockade of May 2, 1861: “But that proclamation did not attempt to affect interior intercourse and commerce between the people of the conflicting states, and cannot be understood as having any such legal effect, and so Congress seemed to think when by the act of July 13, 1861, it authorized the President to issue a proclamation interdicting all commercial intercourse between the citizens of the then and thereby recognized belligerent states. This enactment was impliedly an authoritative recognition of the fact that insurrection had culminated into war. Before that time the national government had not acknowledged that secession had become belligerence, with all belligerent rights and obligations resulting, according to the laws of technical war, and this statute necessarily implies also that Congress did not consider previous intercourse between all the states as illegal, and consequently did not recognize such a previously subsisting war as per se made commercial intercourse contraband and contracts void. And history, verified by the presentment of this note for payment in New Orleans after the second of May, 1861, shows that after the blockade there was some commercial intercourse between the contesting states which had never been adjudged unlawful, and will, we presume, never be so decided. But before contracts shall be nullified by war both reason and justice require that the contracting parties should have cause to know when they contracted that they violated the laws of an existing war. And to give notice of the congressional recognition of such a state of war was the sole object of requiring the president to proclaim the fact of recognition by the act of the 13th of July, 1861, and that proclamation was made on the

<sup>117</sup> Wheaton's International Law, ed. 1863, 884; Hall's International Law, ed. 1880, 482; Halleck's International Law and Law of War, ed. 1801, c. 34, p. 844; Walker's Manual of International Law, ed. 1895, 156; 1 Duer on Insurance, ed. 1845, 593.

<sup>118</sup> 2 Bush (Ky.), 296; 92 Am. Dec. 483.

16th of August, 1861, and before that time contracts and other acts of commercial intercourse were not made illegal by the war." The Prize cases<sup>119</sup> related to vessels in port or upon the high seas after the time allowed by proclamation by the President for blockade, and it was held that such proclamation of April 27 and 30, 1861, prohibited in effect all commercial relations and was of itself conclusive evidence of war. The court was divided, four of the justices dissenting, and holding that commercial relations did not cease till August 16, 1861. And the court in *Perkins v. Rogers*<sup>120</sup> says of these cases: "The decision pronounced by the majority of the court has been overruled by several decisions rendered, and the opinion expressed by the minority of the court has since been approved and recognized as the law." In *Smith v. Charter Oak Life Insurance Company*<sup>121</sup> a citizen of Virginia had his life insured in a Connecticut company. The premium had been paid for several years until May, 1861, when they were refused by the company. After the death of the assured the beneficiary brought an action for damages against the company for dissolving the contract by its refusal to receive premiums. The action was sustained and damages given for the value of the policy when dissolved with interest on that amount, it being held that nonintercourse between the states could not be pleaded as justifying the nonpayment on the ground that the proclamation by the President of August 16, 1861, made pursuant to the act of Congress of July 13, 1861, was the date of prohibition of commercial intercourse. In the *Protector*,<sup>122</sup> Chief Justice Chase, who delivered the opinion of the court, says: "The question in the present case is, When did the Rebellion begin and end? In other words, What space of time must be considered as excepted from the operation of the statute of limitations by the war of the Rebellion? Acts of hostility by the insurgents occurred at periods so various and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and close of

<sup>119</sup> 2 Black (U. S.), 635.

<sup>120</sup> 35 Ind. 124; 9 Am. Rep. 639.

<sup>121</sup> 64 Mo. 330.

<sup>122</sup> 12 Wall. (U. S.) 700.

the late Civil War, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates, and for obvious reasons those of the executive department which may be, and in fact was at the commencement of hostilities obliged to act during the recess of Congress, must be taken. The proclamation of intended blockade by the President may, therefore, be assumed as marking the first of these dates, and the proclamation that the war had closed as marking the second. But the war did not begin or close at the same time in all the states. There were two proclamations of intended blockade, the first of the 19th of April, 1861, embracing the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas. The second of the 27th of April, 1861, embracing the states of Virginia and North Carolina, and there were two proclamations declaring the war had closed, one issued on the second day of April, 1866, embracing the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas, and the other issued on the 20th of August, 1866, embracing the state of Texas. In the absence of more certain criteria of equally general application, we must take the date of these proclamations as ascertaining the commencement and close of the war in the states mentioned in them." In *Portsmouth Insurance Company v. Reynolds*<sup>123</sup> the policy provided against loss "by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." April 17, 1861, the "ordinance of secession" was passed; and April 21st, by order of the United States, the navy-yard buildings at Portsmouth were fired; the fire spread to the insured buildings, which were destroyed, and it was decided that the "ordinance" was not in force when the buildings were fired; that the United States government did not become foreign to the state of Virginia by its passage, and an action was maintainable on the policy. In *McStea v. Nathan*,<sup>124</sup> Church, C. J., in his opinion, says: "It

<sup>123</sup> 32 Gratt. (Va.) 613.

<sup>124</sup> 50 N. Y. 166, 171.



is pertinent, therefore, to inquire whether such intercourse was permitted by the government, and if so, up to what period. The Prize cases<sup>125</sup> recognize the acts of the President prior to the assembling of Congress as the acts of the government, having equal effect upon this question as if authorized by Congress. The first proclamation bears date April 15, 1861, prior to which time several of the states had passed ordinances of secession, several of the forts and some public property had been seized, and Fort Sumter had been attacked. The proclamation, after reciting that the laws of the United States were obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, made a call for militia, to the number of seventy-five thousand men, and contains this clause: 'I deem it proper to say that the first service assigned to the force hereby called forth will probably be to repossess the forts, places, and property which have been seized from the Union, and in every event the utmost care will be observed, consistently with the objects aforesaid, to avoid any devastation, *any destruction of, or interference with property, or any disturbance with peaceful citizens in any part of the country.*' The terms of this proclamation repel the idea of prohibiting or restricting free business intercourse between citizens of different sections of this country. On the contrary, it pledges protection to property and the lawful pursuits of peaceful citizens. It seeks only to repossess the property which had been seized, and put down the unlawful combination to resist the laws. The next is a proclamation of intended blockade, bearing date April 19, 1861. The President in his proclamation, after reciting that an insurrection had broken out in several states, and that a combination of persons threatened to grant pretended letters of marque and reprisal, proceeds to say that 'with a view to the same purposes before mentioned, and to the protection of the public peace and the lives and property of quiet and orderly citizens pursuing their lawful avocations, until Congress shall have assembled and deliberated on the said unlawful proceedings, or until the same shall have ceased,' he deems it advisable to set on foot a blockade of the ports of states

<sup>125</sup> 2 Black (U. S.) 635.

in which the insurrection existed. Upon the authority of the Prize cases, this was an act of war upon the part of the government, and justifiable as a war measure based upon the existence of a state of war. But so far as it operated as a restriction upon trade, it was confined to the commerce of the ports, and ostensibly in preventing the filling out of vessels to cruise upon pretended letters of marque and reprisal, and it expressly assumed to protect the lives and property of quiet and orderly citizens pursuing their lawful avocations, '*until Congress shall have assembled and deliberated.*' Nothing is plainer to my mind than the intention by this proclamation to avoid any interference with the business relations of the citizens of this country, except so far as the blockade would have that effect until the meeting of Congress. It seems incongruous to hold that a proclamation which expressly declares protection to citizens in their lawful avocations should have the legal effect of invalidating all business transactions. The next material act of the government bearing upon this question was the act of Congress of July 13, 1861, the fifth section of which declares that in a certain specified contingency 'it may, and shall be, lawful for the President, by proclamation, to declare that the inhabitants of such state, or any section or part thereof where such insurrection exists, are in a state of insurrection against the United States, and thereupon all commercial intercourse between the same and the citizens of the rest of the United States shall cease and be unlawful so long as such hostility shall continue.' This was the first intimation on the part of the government of an intention to prohibit commercial intercourse, while, as we have seen, every previous expression repelled such intention. The fair construction of this act is to regard it both as an admission of the lawfulness of commercial intercourse up to that time and a permission to continue it until the President should issue the proclamation. It is urged that this act provided merely for a warning or notification to the people that war existed so that they might know and protect their rights, but this view is inconsistent with the terms of the act. It authorizes an act to be done, the effect of which, if done, is declared to be to prohibit commercial intercourse from the time

the act is done. It does not purport to prohibit such intercourse, nor to declare a state of war the legal consequence of which would be to prohibit it. The language of the act is utterly inconsistent with the claim that such intercourse was then, or had been, unlawful. In pursuance of this act the President, on the sixteenth day of August, 1861, issued his proclamation declaring certain states in a state of insurrection, and that commercial intercourse with the citizens of other states was unlawful. From that period such intercourse became unlawful, and up to that period, by the implied or express permission of the government, it was lawful. If the war had ceased on the fifteenth day of August, 1861, and the proclamation of the 16th had never been issued, can there be any doubt that the ordinary business relations of the citizens of the respective sections of the Union would have been unaffected? It may well be that the citizens of the insurrectionary states should be regarded as public enemies for the purpose of enforcing the blockade, and that when the courts were interfered with so as to practically prevent an appeal the running of the statute of limitations should be suspended, and that these should be regarded as in consequence of an existing state of war, but they are not necessarily inconsistent with the continuance of ordinary business relations, and certainly not with the rights of the government to permit such continuance. The language used by the government is capable of no other construction than an intention to permit business intercourse. Such must have been the general understanding of the people, and good faith demands that it be maintained." In *Woods v. Wilder*,<sup>126</sup> it was held that a bill of exchange drawn by a member of a partnership in Savannah on his copartners in New York, on August 23, 1861, was illegal and void, by virtue of the proclamation of August 16, 1861.<sup>127</sup>

<sup>126</sup> 43 N. Y. 164; 3 Am. Rep. 684.

<sup>127</sup> See further on this question notes on "Belligerent rights," 91 Am. Dec. 279, 280. *Levying war against United States, what is,* 94 Am. Dec. 579-81; *Wheaton's International Law*, ed. 1863, 514, 523, 526; 1 *Duer on Insurance*, ed. 1845, 592-94, secs. 35, 36; *Hall's International Law*, ed. 1880, pt. III, c. 1, p. 315; *Halleck's International Law and Laws of War*, ed. 1801, c. xv, p. 350; *Walker's Manual of*

International Law, ed. 1895, p. 103, 154. As to the commencement and close of the Civil War in the United States and the different states, see *Adger v. Alston*, 15 Wall. (U. S.) 555; *Lamar v. Browne*, 2 Otto (U. S.), 187; *Batesville Institute v. Kaufmann*, 18 Wall. (U. S.) 151; *Grossmeyer v. United States*, 4 Ct. Cl. 1; *Ross v. Jones*, 22 Wall. (U. S.) 578.



## **TITLE IV.**

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**PARTIES—AGENTS—BENEFICIARIES.**  
(879)



## TITLE IV.

### PARTIES—AGENTS—BENEFICIARIES.

#### CHAPTER XII.

##### PARTIES TO THE CONTRACT—THE INSURED.

- § 305. Who may be parties to the contract.
- § 306. Who are not parties.
- § 307. Parties—Infants.
- § 308. When aliens may be insured.
- § 309. Relations of insurer and insured.
- § 310. Name of assured need not be set out.
- § 311. Name: Evidence admissible to show actual party in interest.

§ 305. **Who may be Parties to the Contract.**—All persons capable of contracting may become parties to the contract of insurance. This rule is so well settled as not to require the citation of authorities in its support.

§ 306. **Who are not Parties.**—One whose life is insured by a policy issued to another is not a party to the contract, and cannot recover back money paid by himself for premiums nor avoid the policy for fraud,<sup>1</sup> and a stranger to the policy who pays the premium thereon, without any contract with the person entitled to the benefit of the policy, is a mere volunteer, and obtains no title thereto nor lien on the insurance.<sup>2</sup>

§ 307. **Parties—Infants.**—It is held that an infant may enter into a contract for insurance, which will be obliga-

<sup>1</sup> North American L. Ins. Co. v. Wilson, 111 Mass. 542.

<sup>2</sup> Lockwood v. Bishop, 51 How. Pr. (N. Y.) 221.  
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tory upon the company but voidable by the infant.<sup>3</sup> But it is also decided that a mutual benefit society incorporated under the laws of New York,<sup>4</sup> said laws being silent as to the limitation of the age of members, cannot insure the lives of minors,<sup>5</sup> since mutuality of obligation being the fundamental principle upon which these corporations are established under this act, and the relation between the members and the society being one of contract, an infant cannot become a member, since he is not able to contract.<sup>6</sup> In Illinois a view contrary to that expressed in the New York case, has been taken, it being said, that since there is no legal obligation to pay the dues, and the only result of a failure to pay is suspension from membership, an infant may, upon the performance of the conditions prescribed, become a member and be entitled to the benefits of a contract<sup>7</sup> which provides that "no person shall become a member who is under ten or over seventy years of age." It has also been held that insurance against loss by fire is not a contract for necessities binding upon an infant.<sup>8</sup>

**§ 308. When Aliens may be Insured.**—An alien friend may enter into and enforce a contract of insurance.<sup>9</sup> So an alien enemy residing here by permission of the government may sue and be sued in our courts, and he or his agent receive payment of the debt.<sup>10</sup> Alien enemies residing in a hostile

<sup>3</sup> *Monaghan v. American F. Ins. Co.*, 53 Mich. 238.

<sup>4</sup> Stats. 1883, c. 175.

<sup>5</sup> *In re Globe Mut. B. Assn.*, 43 N. Y. 756; 17 N. Y. Supp. 852. *Van Brunt*, P. J., dissenting.

<sup>6</sup> *Van Brunt*, P. J., dissented from this view, but held, upon other grounds, that a minor could not become a member.

<sup>7</sup> *Chicago Mut. L. Ind. Assn. v. Hunt*, 127 Ill. 257. The statute was silent in this case as to the age of members, but the certificate of association provided that "no person shall become a member who is under ten or over seventy years of age." "It follows that unless the society is permitted by the express provisions of the law governing its organization to admit infants into its membership, a contract between the society and a person who has not attained the age of majority is one into which the society may not enter": *Niblack's Mutual Benefit Societies*, ed. 1888, sec. 142.

<sup>8</sup> *New Hampshire M. F. Ins. Co. v. Noyls*, 32 N. H. 345.

<sup>9</sup> *Pisani v. Lawson*, 6 Bing. (N. C.) 90.

<sup>10</sup> *Clark v. Morey*, 10 Johns. (N. Y.) 70; *Buchanan v. Conry*, 19 Johns.

country may, by treaty between the belligerent powers, have all the rights and remedies which are enforceable in the courts.<sup>11</sup> So the war itself has been held to create by necessity a contract with an alien enemy which would be enforceable in time of peace,<sup>12</sup> as in case of ransom bills;<sup>13</sup> and a contract with an alien enemy before the war may be fulfilled during war by performance or payment to an agent in the United States appointed before the war.<sup>14</sup> So if an alien enemy have the privilege or license to trade or hold property he may be insured,<sup>15</sup> and it is held that an enemy's license to trade is the legitimate subject of insurance.<sup>16</sup>

§ 309. *Relations of Insurer and Insured.*—The relation between the parties to a contract of insurance is that of debtor and creditor, of one contracting party to another contracting party, but not that of trustee and cestui que trust. It is a legal, rather than an equitable, relation.<sup>17</sup> In mutual ben-

(N. Y.) 137; 10 Am. Dec. 200. See *United States v. Grossmayer*, 9 Wall. (U. S.) 72. See note, "Contracts with alien enemies and right to sue them in our courts," 96 Am. Dec. 624-33.

<sup>11</sup> *Society for the Prop. of the Gosp. v. Wheeler*, 2 Gall. (C. C.) 105, 127, per Story, J.

<sup>12</sup> *Griswold v. Waddington*, 16 Johns. (N. Y.) 451, per Chancellor Kent.

<sup>13</sup> *Ricord v. Bettenham*, 3 Burr. 1734; *Cornu v. Blackburne*, Doug. 641. See, also, *Antoine v. Morehead*, 6 Taunt. 237 (a case of a bill of exchange drawn by a British prisoner in France for his support, which was indorsed to an alien enemy and held enforceable after the war).

<sup>14</sup> *United States v. Grossmayer*, 9 Wall. (U. S.) 72; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137; 10 Am. Dec. 200; *Kershaw v. Kelsey*, 100 Mass. 561, 97 Am. Dec. 124; per Gray, J.

<sup>15</sup> *Kensington v. Inglis*, 8 East, 273; *McStea v. Matthews*, 50 N. Y. 166, per Church, C. J.; *Fenton v. Pearson*, 15 East, 419. See *Clarke v. Morey*, 10 Johns. (N. Y.) 69.

<sup>16</sup> *Perkins v. New England Ins. Co.*, 12 Mass. 214; *Hayward v. Blake*, 12 Mass. 176. But see 1 *Duer on Insurance*, ed. 1845, 588, 589, sec. 32.

<sup>17</sup> See *Bewley v. Equitable L. Ins. Co.*, 61 How. Pr. (N. Y.) 345; *Re Haycock's Policy*, L. R. 1 Ch. D. 611; *Matthew v. Northern Assur. Soc.*, L. R. 9 Ch. D. 80; *Lothrop v. Stedman*, 42 Conn. 583, 589; *Bogardus v. New York L. Ins. Co.*, 101 N. Y. 328; *Pierce v. Equitable L. A. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433; 12 N. E. Rep. 858. *Examine State v. Standard L. Assn.*, 38 Ohio St. 281; *Willcutts v. Northwestern M. L. Ins. Co.*, 81 Ind. 307.

effit associations the by-laws, articles of association, and certificates of membership determine the rights of the members and of the association, and may be enforced by the parties and beneficiaries according to their respective rights as therein provided,<sup>18</sup> for the rights of the insured or of persons claiming insurance in either a mutual insurance company or a mutual benefit society arise out of and depend upon the contract between the parties, and must be ascertained and fixed by that contract, regardless of the character of the company.<sup>19</sup> So it is held in New York that the holder of a policy in a mutual company is in no sense a partner of the corporation, but his relation with the company is one of contract, measured by the terms of the policy.<sup>20</sup> Again, where a party contracts for the insurance of property and pays the premium, and the loss is made payable to him, the agreement to pay the loss is a contract with the person who pays the consideration.<sup>21</sup> So if by the terms of the policy the loss is made payable to a mortgagee, the contract is one for the benefit of the mortgagee.<sup>22</sup> Notwithstanding the above decisions, it is held, as we have noted elsewhere, that in construing a life policy in a mutual benefit society the courts will, as far as possible, hold it to be in the nature of a testament, and treat it as a will,<sup>23</sup> and an insured member in a mutual benefit society has no interest or property in the fund, but only the power of appointment, which must be exercised to become operative.<sup>24</sup> In Massachusetts, it is decided that one who holds a policy on the tontine plan is a creditor at the termination of the tontine period, and not a member of the company, and is therefore entitled to an ac-

<sup>18</sup> *Union Mut. Assn. v. Montgomery*, 70 Mich. 587; 14 Am. St. Rep. 519.

<sup>19</sup> So held in *Block v. Valley M. Ins. Assn.*, 52 Ark. 201; 20 Am. St. Rep. 166.

<sup>20</sup> *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421; 4 Am. St. Rep. 482.

<sup>21</sup> *Traders' Ins. Co. v. Pacaud*, 150 Ill. 245; 41 Am. St. Rep. 355.

<sup>22</sup> *Maxey v. New Hampshire etc. Ins. Co.*, 54 Minn. 272; 40 Am. St. Rep. 325.

<sup>23</sup> *Chartrand v. Brace*, 16 Col. 19; 25 Am. St. Rep. 235.

<sup>24</sup> *Rollins v. McHatton*, 16 Col. 203; 25 Am. St. Rep. 260; *Northwestern etc. Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810.

counting.<sup>26</sup> But in a New York case<sup>26</sup> the action was for an accounting, and it was claimed "that the relation between the plaintiff and defendant is not one solely of contract, but that as to the participation in the profits of this tontine system that relation is similar to one of trustees and cestui que trust." The court, in determining this claim, said: "We are convinced, after a careful examination of the character of the relations existing between these parties that it cannot be said that the defendant is in any sense a trustee of any particular fund for the plaintiff, or that it acts, as to him and in relation to any such fund, in a fiduciary capacity. It has been held that the holder of a policy of insurance even in a mutual company, was in no sense a partner of the corporation which issued the policy, and that the relation between the policy holder and the company was one of contract measured by the terms of the policy."<sup>27</sup> Upon the payment of the premiums by the various policy holders embraced in the tontine class the money immediately becomes the property of the company, and no title thereto remains in any of the policy holders. Under such a policy as this there is no obligation on the part of the corporation to keep the premiums paid on such policies separate and apart from its other funds. Nor is there any obligation on its part to invest such funds in any particular way or at any particular time. The contract contemplates the fact that the funds will be invested; but the character of such investment is left absolutely to the discretion of the defendant, except as it may be limited by the laws of the state. . . . The question is distinctly up, as to what rights the plaintiff had after the expiration of the ten-year period, the policy itself being in force; and unless there was some relation fiduciary in its nature, the right to an accounting on that ground cannot be claimed. We think the payment of a premium by the policy holders of this class of policies is much more like that of a

<sup>26</sup> *Pierce v. Equitable L. Assur. Soc.*, 145 Mass. 56; 1 Am. St. Rep. 433; 12 N. E. Rep. 858.

<sup>26</sup> *Uhlmann v. New York etc. Co.*, 109 N. Y. 421; 17 N. E. Rep. 363; 27 Cent. L. J. 360; 4 Am. St. Rep. 482.

<sup>27</sup> See *Cohen v. Insurance Co.*, 50 N. Y. 610; 10 Am. Rep. 522; *People v. Insurance Co.*, 78 N. Y. 114.

deposit in a bank by a depositor, as to which it is conceded that there is no such relation as that of trustee and cestui que trust.<sup>28</sup> By the very terms of this policy the amount of the fund is necessarily uncertain. What it may be depends, not only upon the number of policies taken out during the period, but upon the number of policies in the class which may lapse or become forfeited, and upon the amount of the proper expenses of the company which shall justly become chargeable to this fund. So that the dividend which may come to the plaintiff, or any other policy holder, depends upon numerous contingencies, and in relation to all these matters the parties have agreed in specific terms, contained in the policy itself, that this surplus or fund, derived as already stated, 'shall be apportioned equitably among such policies of the same class as shall complete their ten-year dividend period.' Here is the extent of the obligation of the defendant—that it shall equitably apportion this sum. As has been said, there is no title in the plaintiff to any specific moneys. There is, in reality, no specific or separate fund, as it is made up simply by a system of debits and credits contained in the books of the company, which debits and credits are made during the running of the tontine period. There is no separation of the fund belonging to this system, and no legal necessity for such separation from any other fund or property belonging to the defendant. The situation of the parties is that of debtor and creditor simply, the amount of such debt being determinable by this equitable apportionment, which, taking the language of the policy into consideration, necessarily means that the apportionment is to be made by the corporation through its officers." And it was held that equity would not order an accounting on the principle of trusteeship. The court also says of the Massachusetts case above noted that it "was decided under the peculiar wording of the statute of Massachusetts in regard to complicated accounts, and we do not think it should be followed by the courts of this state." The New York case is also in accord with the decision in a case in the United States circuit court, where it is held that no trust relationship, which can

<sup>28</sup> See *Foley v. Hill*, 2 H. L. Cas. 32.

give equity jurisdiction, exists between the holder of a tontine policy and an insurance company in which he is entitled to a share of the assets.<sup>29</sup> A "participating policy" of life insurance, whereby surplus profits of the company are shared with others holding like policies, does not create a trust relation between the parties.<sup>30</sup>

**§ 310. Name of Assured Need not be Set Out in Policy.**

It is not necessary to the validity of the policy that the name of the assured should appear therein. He may be described in other ways than by name.<sup>31</sup> A party may insure as agent or trustee, naming the actual party in interest;<sup>32</sup> or one may insure in his own name goods held in trust by him, and he can recover for their entire value, holding the excess over his own interest for the benefit of those who have intrusted the goods to him;<sup>33</sup> or an agent may insure in his own name as agent;<sup>34</sup> or a consignee may effect an insurance in his own name on account of whom it concerns, loss payable to him, and, in case of loss, may maintain an action thereon;<sup>35</sup> or the policy may be left blank and the name filled in, or it may be made for "whom it may concern," or to the "estate of";<sup>36</sup> and a policy on "account of —," or "for —," is equivalent to a policy "for whom it may concern."<sup>37</sup> If property is insured "on account of whom it may concern," there is a privity between the insurance company and the actual owner of the property from

<sup>29</sup> *Hunton v. Equitable L. Assur. Soc.*, 45 Fed. Rep. 661.

<sup>30</sup> *Taylor v. Charter Oak L. Ins. Co.*, 9 Daly (N. Y.), 489.

<sup>31</sup> *Weed v. London F. Ins. Co.*, 116 N. Y. 106, 114; 22 N. E. Rep. 231; *Weed v. Hamburg-Bremen F. Ins. Co.*, 133 N. Y. 394.

<sup>32</sup> *Holmes v. United Ins. Co.*, 2 Johns. Cas. (N. Y.) 329.

<sup>33</sup> *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387; 19 Ins. L. J. 385; 10 Sup. Ct. Rep. 365.

<sup>34</sup> *Davis v. Boardman*, 12 Mass. 80; *Marts v. Cumberland Ins. Co.*, 44 N. J. L. 478.

<sup>35</sup> *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77.

<sup>36</sup> *Fire Ins. Assn. v. Merchants' etc. Co.*, 66 Md. 339; *Turner v. Burrows*, 8 Wend. (N. Y.) 144; *Clinton v. Hope Ins. Co.*, 51 Barb. (N. Y.) 647; 45 N. Y. 454. But see *State v. Standard L. Assn.*, 38 Ohio St. 281.

<sup>37</sup> *Burrows v. Turner*, 24 Wend. (N. Y.) 276; 35 Am. Dec. 622. See *Turner v. Burrows*, 8 Wend. (N. Y.) 141.

the time of the insurance and the contract is with him as the assured.<sup>38</sup> And if one is named by mistake it may be cured by indorsement,<sup>39</sup> and in such case a recovery may be had in the name of the real party in interest, for the indorsement may be regarded as a new contract of insurance with him.<sup>40</sup>

**§ 311. Name—Evidence Admissible to Show Actual Party in Interest.**—If the name of the person for whose benefit the insurance is obtained does not appear upon the face of the policy, or if a blank is left in the policy for the name of the person on whose account the insurance is effected, or if the designations used are applicable to several persons, or if the description of the assured is imperfect or ambiguous, or the policy be "to whom it may concern," evidence aliunde may be resorted to to ascertain the meaning of the contract and to show who are the real parties in interest.<sup>41</sup> So in an action upon a policy in the name of a party not the owner, a letter from an owner, directing the plaintiff to obtain insurance on the vessel in his own name, and stating the interest of the plaintiff in the vessel insured, is admissible in evidence for the plaintiff.<sup>42</sup> In such cases the risk attaches to the interest of the party actually intended to be covered, and he may sue,<sup>43</sup> even though such intention may have been unknown to the insurer.<sup>44</sup> But the party intended must have been in contemplation of the contract, or the insured must have subsequently

<sup>38</sup> *Pacific Mail S. S. Co. v. Great Western Ins. Co.*, 65 Barb. (N. Y.) 334.

<sup>39</sup> *Sohns v. Rutgers F. Ins. Co.*, 4 Abb. App. (N. Y.) 279.

<sup>40</sup> *Sohns v. Rutgers F. Ins. Co.*, 4 Abb. App. (N. Y.) 279.

<sup>41</sup> *Weed v. London etc. Ins. Co.*, 116 N. Y. 106, 114; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Burrows v. Turner*, 24 Wend. (N. Y.) 276; 35 Am. Dec. 622; *Weed v. Hamburg-Bremen F. Ins. Co.*, 133 N. Y. 394; *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553.

<sup>42</sup> *Vairin v. Canal Ins. Co.*, 10 Ohio, 223.

<sup>43</sup> *Crosby v. New York etc. Ins. Co.*, 5 Bosw. (N. Y.) 369, 377; *Hooper v. Robinson* (98 U. S.), 8 Otto, 528; *Cincinnati Ins. Co. v. Rie- man*, 1 Disn. (Ohio) 396; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; *Newson v. Douglass*, 7 Har. & J. (Md.) 417; 16 Am. Dec. 317; *The Sidney*, 23 Fed. Rep. 88.

<sup>44</sup> *The Sidney*, 27 Fed. Rep. 119; *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151; *Newson v. Douglass*, 7 Har. & J. (Md.) 417; 16 Am. Dec. 317. See, also, *Hurlburt v. Pacific Ins. Co.*, 2 Sam. (C. C.) 471.

adopted it, for this clause does not cover any and everybody who may chance to have an interest in the thing insured.<sup>45</sup> Where a party who has an insurable interest in a house owned by another takes out a policy in the owner's name, and upon its loss collects the insurance money as the owner's agent, he is liable to the owner therefor without a prior demand, and cannot defend on the ground that he intended the insurance to cover his own interest.<sup>46</sup> Where a policy is issued by a mutual insurance company "for whom it concerns" to one who has no interest in the property insured, the owner of the property, by whose authority the policy was obtained, may maintain an action, subject to any right given to the insurers by the terms of the policy to deduct any amount due them from the insured.<sup>47</sup> But it was held in an Iowa case that an action at law could not be maintained by Caroline Zimmerman upon a policy issued to "C. Zimmerman, where the application was referred to as a part of the policy and was signed Conrad Zimmerman."<sup>48</sup> And a policy of insurance made in the name of a particular person who is the owner of a small proportion of the property insured cannot be made to cover the interest of others upon parol proof that the application for insurance was for such others, as well as for the party named, and that this was well known to the insurers, and that it was the intention of all the parties that the policy was to cover the interest of all the owners.<sup>49</sup> Where an Indiana Insurance Company located at Evansville, in said state, in order to do business in Ohio and avoid the laws of that state prescribing the terms upon which insurance companies might carry on business therein, issued to persons, who insured with their agents, H. & B., in Ohio, certain slips, certifying that H. & B. were insured in the property therein described under an open policy, numbered 38, which

<sup>45</sup> *Newson v. Douglass*, 7 Har. & J. (Md.) 417; 16 Am. Dec. 317; *Hooper v. Robinson* (98 U. S.), 8 Otto, 528; *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606.

<sup>46</sup> *Looney v. Looney*, 116 Mass. 283.

<sup>47</sup> *Cobb v. New England etc. Ins. Co.*, 6 Gray (Mass.), 192.

<sup>48</sup> *Zimmerman v. Farmers' Ins. Co.*, 76 Iowa, 352; 41 N. W. Rep. 39.

<sup>49</sup> *Finney v. Bedford etc. Ins. Co.*, 8 Met. (Mass.) 348; 41 Am. Dec. 515.



the insurance company had previously issued to H. & B., its own managing agent at Evansville. H. & B. insured plaintiff on a cargo of salt in a barge on the Ohio river; they received the premium from plaintiff and delivered to him a slip certifying that they, the agents, were insured under the open policy, number 38. The company knew that plaintiff was the owner of the salt, and knew everything material to the risk. The salt was shipped by plaintiff to S. & Co., Memphis, who was expected to make advances thereon and pay charges therefor, and S., one of the firm, was made appointee in the slip or insurance certificate to receive the insurance in case of loss. The salt became a total loss by the perils insured against; proof was made of loss, and the plaintiff's interest therein. It was held that parol evidence was admissible to show that plaintiff was the party intended to be insured, although the contract was in writing and there was no ambiguity on its face concerning the same; that the company was bound to know what its agents, H. & B., knew, and could not set up the latter's want of interest in the property, and could not evade liability by saying that the contract was void; that even if it should be held void because H. & B., while acting as agents for the company, could not insure themselves, nevertheless the writings and parol proof showed a valid parol contract to insure plaintiff; that the action was properly brought in plaintiff's name.<sup>50</sup> The court says: "In applying insurance contracts to the proper subject matter and the party or parties intended to be covered by the risk, courts have been liberal in receiving parol testimony in favor of the assured. It is well settled that when a written contract is made by an agent in his own name, the undisclosed principal may sue upon it, and prove by parol evidence that the contract was made for his benefit, and this may be done although the other party had no knowledge of the agency, and supposed he was dealing with the one who was acting for himself."<sup>51</sup>

<sup>50</sup> *Daniels v. Citizens' Ins. Co.*, 5 Fed. Rep. 425.

<sup>51</sup> Citing *Huntington v. Knox*, 7 Cush. (Mass.) 371; *Story on Agency*, sec. 61; *Insurance Co. v. Chase*, 5 Wall. (U. S.) 509; *Shawmutt S. R. Co. v. Hampden Ins. Co.*, 12 Gray (Mass.), 540; *Rider v. Ocean Ins. Co.*, 20 Pick. 259; *Archangel v. Thompson*, 2 Camp. 620; *Thompson v. Rail-*

road Co., 6 Wall. (U. S.) 137; Insurance Co. v. Wilson, 6 Ohio St. 581; Anson v. Winneshiek Ins. Co., 23 Iowa, 85. On the point that parol insurance is valid, the court cites Relief Ins. Co. v. Eggleston, 96 U. S. 574; Sanborn v. Fireman's Ins. Co., 16 Gray (Mass.), 448; 77 Am. Dec. 419.

## CHAPTER XIII.

### PARTIES—MEMBERS OF MUTUAL INSURANCE COMPANIES.

- § 316. Parties: Members of mutual insurance companies.
- § 317. Membership exists when contract is completed.
- § 318. Obligations and rights of members generally.
- § 319. Relations of members of mutual companies: Partnership.

§ 316. **Parties—Members of Mutual Insurance Companies.**—Members of mutual insurance companies and of mutual benefit societies, the legal status of which is that of insurance companies, sustain a dual relation, since each member is at once the insured and insurer. In one aspect his relation is substantially that of a policy holder, or a party who has contracted upon a consideration for an indemnity or for the payment of money upon the happening of a specified contingency. He has all such rights against the corporation or association as are defined by his contract with it and which could validly be enforced thereunder. In another aspect he is a member of the corporation, and becomes an indemnifier of the other members as the corporation or association represents to each member the aggregate of the other members. The members have, or may have, a voice in the management of the company's affairs,<sup>1</sup> and their corporate rights depend upon the charter or articles of association, and the by-laws and rules of the organization, as these embody the compact between the corporation or association and its members, and to this resort must be had for the settlement of such questions as involve their duties and rights with relation to the organization.<sup>2</sup> It is held in Massachu-

<sup>1</sup> See *State v. Standard L. Assn.*, 38 Ohio St. 281.

<sup>2</sup> *Commonwealth v. Massachusetts F. Ins. Co.*, 112 Mass. 116, 120, per the Court; *Planters' Ins. Co. v. Comfort*, 50 Miss. 662, 668, per the Court; *Rosenberger v. Washington M. F. Ins. Co.*, 87 Pa. St. 207; *Com-*

setts<sup>3</sup> that a statute providing that the conditions of insurance shall be stated in the body of the policy<sup>4</sup> does not apply to the obligations of the insured as a member of the corporation; and that the contract of each member contains obligations on the part of the corporation which enter into and qualify the contract of every other member. It is necessary and equitable that each person who gets insured in such company or society should become subject to the same obligations toward his associates that he requires from them toward himself.<sup>5</sup> But where a company is organized upon the mutual plan, having no capital stock, and receives, as a substitute therefor, notes for premiums in advance, the makers of such notes do not thereby become stockholders of the corporation.<sup>6</sup> So where a person procured a policy of insurance for a term of years at a fixed annual premium, and paid the first year's premium in advance, and gave a note payable in installments at the commencement of each of the years during which the policy ran, it was decided that the assured did not thereby become a stockholder, or liable for the debts of the company, and that when the company failed all obligation to pay the note terminated.<sup>7</sup> And it is held in Maine<sup>8</sup> that a mutual insurance company has no stockholders, and its original corporators cannot be regarded as such so as to be entitled to assets remaining after dissolution and paying the company's liabilities. But it is declared in a New York case that where the statute<sup>9</sup> provides that an insurance company may sue or be sued by any of "its members or stockholders," the word "members" is synonymous with "stock-

*monwealth v. St. Patrick's Soc.*, 2 Binn. (Pa.) 441; 4 Am. Dec. 452. *Bradfield v. Union Mut. Ins. Co.*, 9 Week. Not. Cas. (Pa.) 436; *Chamberlain v. Lincoln*, 129 Mass. 70; *Grosvenor v. United Soc.*, 118 Mass. 78; *Diehl v. Adams Co. etc. Ins. Co.*, 58 Pa. St. 443; 98 Am. Dec. 302; *Farmers' etc. Co. v. Mylin* (Penn. 1888), 15 Atl. Rep. 710.

<sup>3</sup> *Commonwealth v. Massachusetts F. Ins. Co.*, 112 Mass. 116.

<sup>4</sup> Mass. Stat. 1864, c. 196.

<sup>5</sup> *Baxter v. Chelsea Mut. F. Ins. Co.*, 1 Allen (Mass.), 294; 79 Am. Dec. 730.

<sup>6</sup> *Hill v. Nautilus Ins. Co.*, 4 Sand. Ch. (N. Y.) 577.

<sup>7</sup> *Farmers' etc. Ins. Co. v. Smith*, 63 Ill. 187.

<sup>8</sup> *Titcomb v. Kennebunk Mut. F. Ins. Co.*, 79 Me. 315, 316; 9 Atl. Rep. 732.

<sup>9</sup> N. Y. Laws, 1853, c. 463, sec. 107.

holders."<sup>10</sup> Sometimes, however, the members of mutual insurance companies are made stockholders by the statute of incorporation.<sup>11</sup> Again the holders of certificates are not creditors within the meaning of a statute relative to proceedings in equity against corporations.<sup>12</sup> As such member, the company's books are, in law, as much his as other members;<sup>13</sup> but until the act of insurance is consummated he is a stranger to the organization.<sup>14</sup> It is held in Pennsylvania that where one becomes a member of a mutual insurance company, he has a right to vote for the directors, and that they are none the less his representatives, though they are incompetent, extravagant, or careless of their trust.<sup>15</sup>

**§ 317. Membership Exists when Contract is Completed.**

A person becomes a member or co-corporator of a mutual insurance company or mutual benefit society, whose legal status is that of an insurance company, when the contract is completed, and prior to that time he is a stranger to the organization,<sup>16</sup> although where a party had a policy on his barn, and subsequently applied for insurance on its contents, it was decided that at the time of the latter application he was a member.<sup>17</sup> Where the secretary of defendant company, who was its general agent for that purpose, received applications of more than fifty persons for insurance and membership in the company, accompanied by their premium notes, etc., and plaintiff's application and premium note were so received, and his due-

<sup>10</sup> *People v. Security L. etc. Co.*, 78 N. Y. 114; 7 Abb. N. C. (N. Y.) 198; 34 Am. Rep. 522.

<sup>11</sup> "All persons insuring upon the mutual plan in any company organized in accordance with the provisions of this act shall constitute its members and stockholders," etc.; and providing also the extent of their liability: Kan. Laws, 1875, c. iii, secs. 5, 8.

<sup>12</sup> *Hill v. Nautilus Ins. Co.*, 4 Sand. Ch. (N. Y.) 577.

<sup>13</sup> *Diehl v. Adams Co. etc. Ins. Co.*, 58 Pa. St. 443; 98 Am. Dec. 302.

<sup>14</sup> *Cumberland etc. Co. v. Schell*, 29 Pa. St. 31.

<sup>15</sup> *Koehler v. Beeber* (Pa. 1889), 23 Week. Not. Cas. 558; 16 Atl. Rep. 354.

<sup>16</sup> See sec. 53 herein.

<sup>17</sup> *Farmers' Mut. Ins. Co. v. Mylin* (Pa.), 15 Atl. Rep. 710. See *Fuller v. Madison etc. Co.*, 36 Wis. 599; *Tyrell v. Washburn*, 6 Allen (Mass.), 466.

bill for the ten per cent and fees required to be paid in advance was accepted by the secretary, and the board of directors thereupon completed the organization of the company, it was held that the plaintiff (like all other persons whose application, etc., had been so received up to the time of such organization) was a member of the company, liable to assessment for the payment of subsequent losses of other members, and entitled to a policy upon the property described in his application, although the directors had not formally approved of such application or indorsed their approval thereon, in the day of such organization, as required by the by-laws.<sup>18</sup>

**§ 318. Obligations and Rights of Members Generally.**

Where one becomes a member of such organizations as are the subject of consideration herein, he becomes bound by the charter and by-laws or articles of association and rules of the society.<sup>19</sup> He is bound, aside from the express provisions of the policy relating to the point at issue, to take notice of the by-laws of the company.<sup>20</sup> Nor can he, as such member, deny the validity of by-laws which he has assented to by becoming a member, on the ground that they were not regularly adopted,<sup>21</sup> nor avail himself of any irregularity which affects the company's incorporation.<sup>22</sup> And such member is liable for his proportionate share of the losses which may occur while he is a member: that is, for the time during which his policy runs, and no longer;<sup>23</sup> but he is not bound by a by-law subsequently passed which is in conflict with the charter and to which

<sup>18</sup> *Van Slyke v. Trempealeau etc. Ins. Co.*, 48 Wis. 683; 39 Wis. 390; 20 Am. Rep. 50.

<sup>19</sup> *Supreme Lodge etc. v. Knight*, 117 Ind. 489; *Hesinger v. Home B. Assn.*, 41 Minn. 516; 43 N. W. Rep. 481; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402; *Walsh v. Aetna L. Ins. Co.*, 30 Iowa, 133; 6 Am. Rep. 664; *Simeral v. Dubuque etc. Ins. Co.*, 18 Iowa, 319; *Coles v. Iowa etc. Ins. Co.*, 18 Iowa, 425. See sec. 53, herein.

<sup>20</sup> *Treadway v. Hamilton etc. Ins. Co.*, 29 Conn. 68.

<sup>21</sup> *Pfister v. Gerwig*, 122 Ind. 567; 23 N. E. Rep. 1041.

<sup>22</sup> *Traders' Mut. F. Ins. Co. v. Stone*, 9 Allen (Mass.), 483; *Nashua F. Ins. Co. v. Moore*, 55 N. H. 48; *Sands v. Hill*, 42 Barb. (N. Y.) 651.

<sup>23</sup> *Manlove v. Naw*, 39 Ind. 289; *Manlove v. Binder*, 39 Ind. 371; 13 Am. Rep. 280.

he did not assent, unless he has expressly agreed that by-laws may be subsequently enacted;<sup>24</sup> nor is he bound by the business regulations and instructions to agents adopted by the officers of the company,<sup>25</sup> although it is held that as such member, the books of the company or association are evidence against him to show the action of the managers.<sup>26</sup> But before a party becomes such a member he cannot be bound by the acts of the company's agents,<sup>27</sup> nor by its charter and by-laws or articles of association and rules.<sup>28</sup> And one who is induced to become a member by fraud of the company or its authorized agents incurs thereby no obligations toward the company.<sup>29</sup> A valid contract with such a company or society is, however, binding on both parties, the insured and the company.<sup>30</sup>

**§ 319. Relations of Members of Mutual Companies—Partnership.**—The relations of members in companies or associations, the legal status of which is that of insurance companies, is declared in some cases to be that of partners, in others not. In Georgia, it is held that a mutual insurance company is governed by the general law of partnership as to division of profit and loss, so far as its charter does not change the rule, and in dividing profits equity will regard the rights of all those who have contributed premiums without regard to the fact whether they were members when the profits were distributed.<sup>31</sup> So in Pennsylvania it is declared that persons insuring in a

<sup>24</sup> *Great Falls Mut. F. Ins. Co. v. Harney*, 45 N. H. 292; *Northwestern B. etc. Assn. v. Warner*, 24 Bradw. (Ill.) 361; *New England Mut. F. Ins. Co. v. Butler*, 34 Me. 451.

<sup>25</sup> *Walsh v. Aetna L. Ins. Co.*, 30 Iowa, 133; 6 Am. Rep. 664.

<sup>26</sup> *Diehl v. Adams Co. etc. Ins. Co.*, 58 Pa. St. 443; 98 Am. Dec. 302.

<sup>27</sup> *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Cumberland etc. Co. v. Schell*, 29 Pa. St. 31.

<sup>28</sup> *Eilenberger v. Protection Ins. Co.*, 89 Pa. St. 464; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331.

<sup>29</sup> *Salmon v. Richardson*, 30 Conn. 360; 79 Am. Dec. 255; *Brown v. Donnell*, 49 Me. 421; 77 Am. Dec. 266; *Jones v. Dana*, 24 Barb. (N. Y.) 3 5.

<sup>30</sup> *New England Mut. F. Ins. Co. v. Butler*, 34 Me. 451.

<sup>31</sup> *Carlton v. Southern Mut. Ins. Co.*, 72 Ga. 371.

mutual insurance company are associated in the nature of limited or special partners.<sup>32</sup> But in New Jersey it is held that the fact that an insurance company is mutual does not create a partnership among the insured, so as to make a contract continuing; the insurance is between the corporation and the insured.<sup>33</sup> A provision, however, in the charter of a stock life insurance company that, after certain dividends to stockholders, the net profits should be paid, twenty per cent to the stockholders and eighty per cent to the policy holders, was decided not to make the policy holders partners; such share was not profits, but simply an equitable adjustment of premiums paid.<sup>34</sup> But the holder of an immatured life policy is entitled to share with other creditors in the assets; he is not a partner.<sup>35</sup> So a policy holder is not a partner of the company.<sup>36</sup> There is no trust relation between the policy holder of the mutual company and the company, and an action in equity will not lie on such a theory.<sup>37</sup> In *People v. Security Life Insurance and Annuity Company*,<sup>38</sup> (the organization was a regular insurance company, incorporated with a capital), the court said: "The argument that they are to be treated as partners is quite ingenious, but I think clearly unsound," and also declared that the stock was contributed by stockholders, and not policy holders, and managed by directors chosen by stockholders, and that the members had no voice in the election of officers unless they were stockholders, and had no voice in the management of the business. In another case, *Mutual Benefit Life Insurance Company v. Hillyard*,<sup>39</sup> the court says: "The suggestion that this being a mutual company the contract is therefore like a partnership, and dissolved, is disposed of by what Allen, J.,

<sup>32</sup> *Krugh v. Lycoming F. Ins. Co.*, 77 Pa. St. 15.

<sup>33</sup> *Mutual etc. Ins. Co. v. Hillyard*, 37 N. J. L. (8 Vroom) 444; 18 Am. Rep. 741.

<sup>34</sup> *People v. Security L. Ins. etc. Co.*, 78 N. Y. 114; s. c., 7 Abb. N. C. (N. Y.) 198; 34 Am. Rep. 522.

<sup>35</sup> *People v. Security L. Ins. Co.*, 78 N. Y. 114; 7 Abb. N. C. (N. Y.) 198; 34 Am. Rep. 522.

<sup>36</sup> *Brown v. Stoerkel*, 74 Mich. 269, 276.

<sup>37</sup> *Taylor v. Charter Oak L. Ins. Co.*, 59 How. Pr. (N. Y.) 468.

<sup>38</sup> 78 N. Y. 114; 34 Am. Rep. 522.

<sup>39</sup> 37 N. J. L. (8 Vroom) 444; 18 Am. Rep. 741.



said in substance in *Cohen v. New York Mutual Life Insurance Company*,<sup>40</sup> that the company is a body corporate, capable of contracting as such, and the relation is between insurer, a corporation, and insured; that the members are not partners between themselves. The contract is the contract of a corporation, and whatever incidental advantages appertain to a member, that does not affect the contract in the policy." In *Cohen v. Mutual Life Insurance Company*,<sup>41</sup> referred to in the last case, the court, Allen, J., says: "But whatever analogies there may be between mutual companies and ordinary partnerships, and the relation of the members of the two organizations, an incorporated company, although organized on the mutual principle, is in no proper or legal sense a partnership. The defendant is a body politic and corporate, capable of contracting and of suing and being sued, and the relation between the plaintiff and the corporation is that of insured and insurer, and the rights and duties of the contracting parties are to be governed and determined by the terms of the policy by which the insurance is effected, as in other cases. Other and incidental rights are secured to the plaintiff as a member of the company, one of the corporators; but this does not make the members partners as between themselves, or affect the express contract of the corporation." In *Brown v. Stoerkel*,<sup>42</sup> Morse, J., declares: "This association was in no sense a copartnership. There was no business carried on by it, and nothing involving a loss or profit in a business sense. It was purely a benevolent and social organization, having also in view the protection, benefit, and welfare of its members in their various employments. It must now be considered as well settled that persons have a right to enter into such associations, and to bind themselves, as to their membership and rights in such societies and the funds of the same, by the constitution and by-laws of the association which they adopt or subscribe to after adoption. Such an organization may be neither a partnership nor a corporation. The articles of agreement of such an association, whether called a 'constitution,' 'charter,' or 'by-laws,' or any

<sup>40</sup> 50 N. Y. 624; 10 Am. Rep. 522.

<sup>41</sup> 50 N. Y. 624; 10 Am. Rep. 522.

<sup>42</sup> 74 Mich. 269, 276.

other name, constitute a contract between the members, which the courts will enforce, if not immoral or contrary to the public policy or the law of the land." In *Gorman v. Bussell*,<sup>43</sup> the association was unincorporated, and its purpose was to provide certain benefits to its members in case of sickness or death. The funds, therefore, were to be raised under its constitution by the collection of an initiation fee, weekly dues, fines, etc. Certain persons claiming membership were excluded from the meetings of the organization, and brought a bill for its dissolution, and an accounting of the partnership. Although no American cases are cited in the opinion, the court apparently relying on the English decisions, it was decided that benevolent associations are partnerships; that voluntary organizations of this character for mutual relief in sickness or distress, provided for by funds raised as they were here, are partnerships, and could be dissolved in equity for improperly excluding a member, and be compelled to account. In *Atkins v. Hunt*,<sup>44</sup> the defendants signed articles of association in trade, under the name of "The Farmers and Mechanics' Store," by which it was provided that any stockholders might withdraw upon giving six months' notice, and that the business of the company should be done pursuant to a major vote of those present. The defendants subscribed a certain sum, and a by-law provided that each member should become a partner, and it was held that the defendants were partners in the company. This was not a contract to form a partnership in futuro, but an actual existing association, liable as partners, and the liability rested upon having signed by-laws forming a present company. It is held in New York,<sup>45</sup> in an action to dissolve it, that a voluntary association established for moral, benevolent, and social objects, where there is no power to compel the payment of dues, and where the right of the member ceases on his failure to make such payment, is not a partnership, and the court per Miller, J., says: "Nor are the plaintiffs entitled to the relief claimed upon the ground that the members of the society were copartners.

<sup>43</sup> 14 Cal. 531.

<sup>44</sup> 14 N. H. 205.

<sup>45</sup> *Lafond v. Deems*, 81 N. Y. 507, 514.

Associations of this description are not usually partnerships. There is no power to compel payment of dues, and the right of the member ceases when he fails to meet his annual subscription. This certainly is not a partnership, and the rights of co-partners as such are not fully recognized. The purpose is not business, trade, or profit, but the benefit and protection of its members as provided for in its constitution and by-laws. In accordance with well-established rules no partnership exists under such circumstances." Another important case is that of *Ash v. Guie*,<sup>46</sup> wherein it was decided that the members of a Masonic lodge are presumptively not partners. The action was assumpsit on a certificate of indebtedness executed by the master and wardens of the lodge, and was directed against a large number of the members. And the court said: "Copartnership has been defined to be a 'combination by two or more persons of capital or labor or skill, for the purpose of business for their common benefit.' . . . It would seem that there must be a community of interest for business purposes. Hence voluntary associations or clubs for social and charitable purposes, and the like, are not proper partnerships, nor have their members the powers and responsibilities of partners. A benevolent and social society has rarely, if ever, been considered a partnership. . . . Here there is no evidence to warrant an inference that when a person joined the lodge he bound himself as a partner in the business of purchasing real estate and erecting buildings, or as a partner, so that other members could borrow money on his credit. The proof fails to show that the officers or a committee, or any number of members, had a right to contract debts for the building of a temple which would be valid against every member from the mere fact that he was a member of the lodge. But those who engaged in the enterprise are liable for the debts they contracted, and all are included in such liability who assented to the undertaking or subsequently ratified it. Those who participated in the erection of the building, by voting for and advising it, are bound the same as the committee who had it in charge; and so with reference to borrowing money. A member

<sup>46</sup> 97 Pa. St. 493; 39 Am. Rep. 818.

who subsequently approved the erection or borrowing could be held on the ground of ratification of the agent's acts." In an English case<sup>47</sup> it is held that the right to participate in the profits of the company did not constitute the insured a partner with the proprietors of the company. Mr. Parsons' definition of partnership contemplates a division of profits as an element of partnership.<sup>48</sup> A right to receive a share of the profits, however, is held in New Jersey not to be an invariable test.<sup>49</sup> But in *Babb v. Reed*<sup>50</sup> it is held that an association for purposes of mutual benevolence among its members only is not an association for charitable uses. If not incorporated, its members are regarded in law as partners in relation to third persons.

<sup>47</sup> *In re English etc. Assur. Soc.*, 11 Week. Rep. 681; 8 L. T., N. S., 724.

<sup>48</sup> *Parsons on Partnerships*, 4th ed., sec. 1. This is also true of the definition under *Deering's Annot. Civ. Code of California*, sec. 2395.

<sup>49</sup> *Leabury etc. v. Bolles*, 51 N. J. L. (22 Vroom) 108; 16 Atl. Rep. 54, and note.

<sup>50</sup> 5 Rawle (Pa.), 151; 28 Am. Dec. 650.

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## CHAPTER XIV.

### PARTIES—THE INSURER.

- § 325. Insurer defined.
- § 326. Stock insurance companies defined.
- § 327. Legislation concerning insurance companies.
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- § 329. Foreign company: Retaliatory and anti-compact laws.
- § 330. Foreign companies: What constitutes "doing business," etc.
- § 331. Foreign company estopped to avoid contract by setting up noncompliance with statute.
- § 332. When contract valid although company has not complied with statute.
- § 333. When contract not valid where company has not complied with statute.
- § 334. Charter: Corporate powers: Ultra vires.
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§ 325. **Insurer Defined:**—An insurer is the person who in a certain sense assumes the risk and undertakes to indemnify or pay a certain sum on the happening of the specified contingency.<sup>1</sup> Such person may be a private individual or a corporation or association. Formerly, a large proportion of the risks were underwritten by private individuals,<sup>2</sup> but the business of insuring in this country is almost exclusively in the hands of corporations or associations, which are divided into either stock companies and mutual companies or associations. Sometimes a company combines both plans of insurance.<sup>3</sup>

<sup>1</sup> See 1 Phillips on Insurance, 3d ed. sec. 2.

<sup>2</sup> See sec. iv, herein; 2 Parsons on Contracts, 7th ed., 351.

<sup>3</sup> The Pennsylvania act of February, 1870, provided that it should be unlawful to issue or execute any policy of insurance or guaranty against loss by fire or lightning, except under authority expressly conferred by a charter of incorporation. See *Arrott v. Walker*, 118 Pa. St. 249; 12 Atl. Rep. 280.

§ 326. **Stock Insurance Companies Defined.**—A stock insurance company is one which has a capital stock owned by its stockholders, and which capital is the basis of its business, and is liable for losses and expenses. Those insured in such companies pay premiums as the basis of their contract with the company.<sup>4</sup> A share of stock may be defined as a right which its owner has in the management, profits, and ultimate assets of the corporation. A stockholder in an insurance company has the same rights as a stockholder in any other corporation, but he has no legal title to the property or profits of the corporation until a dividend is declared or a division made on the dissolution of the corporation.<sup>5</sup>

§ 327. **Legislation Concerning Insurance Companies.** In most, if not all, the states of the Union statutes have been enacted principally for the protection of policy holders, prescribing certain conditions upon which insurance companies or societies may be permitted to organize or transact business within the state, and these apply to both domestic and foreign insurance corporations or societies. The statutes will only be briefly noticed, however, in this work. The power of the state to enact such laws is inherent, since corporations, like natural persons, are subject to the laws which may be enacted for the regulation of the community and the protection of citizens.<sup>6</sup> These laws are numerous; they provide for the possession of a certain capital by insurance companies before commencing business,<sup>7</sup> for the deposit of a security fund with the state,<sup>8</sup> for

<sup>4</sup> See Anderson's Law Dictionary, 558.

<sup>5</sup> Commercial etc. Ins. Co. v. Board of Revenue, 99 Ala. 1; 42 Am. St. Rep. 17.

<sup>6</sup> State v. Matthews, 44 Mo. 523.

<sup>7</sup> People ex rel. Schindler v. Flint (Cal. 1892), 28 Pac. Rep. 495; In re Babcock, 21 Neb. 500; 32 N. W. Rep. 641, under Com. Stat. Neb., 1885, c. 16; People v. Manhattan Mut. F. Ins. Co., 34 N. Y. 570; 12 N. Y. Supp. 264, under N. Y. Laws, 1853, c. 460; State v. Trubey, 37 Minn. 97; 33 N. W. Rep. 554. Held in Williams v. Cheney, 3 Gray (Mass.), 215, that Stat. 1847, Mass., c. 273, sec. 2, and Rev. Stat., c. 37, sec. 42, with regard to payment, etc. of a certain amount of capital before doing business, did not apply to mutual insurance companies. See, also, Atlantic etc. Ins. Co. v. Concklin, 6 Gray, (Mass.), 73; State v. Critchet, 37 Minn. 13; 32 N. W. Rep. 787.

<sup>8</sup> Attorney General v. North American L. Ins. Co., 82 N. Y. 172,

giving bonds,<sup>9</sup> for an examination into the company's affairs,<sup>10</sup> for furnishing information to the superintendent of insurance by the companies regarding their business and financial condition,<sup>11</sup> for making reports to the comptroller,<sup>12</sup> for returns to the insurance commissioners,<sup>13</sup> for the payment of a license tax or fee,<sup>14</sup> for the taxation of corporate property,<sup>15</sup> for proceed-

under N. Y. Laws, 1866, c. 576; *Employers' Liability Assur. Co. v. Commissioner of Insurance*, 64 Mich. 614; 31 N. W. Rep. 542; under Mich. Stat. Laws, 1881, p. 279, Act 237; *People v. Chapman*, 5 Hun (N. Y.), 222.

<sup>9</sup> *Kaw Life Assn. v. Lemke*, 40 Kan. 661; 20 Pac. Rep. 512, under Laws Kan. 1885, c. 131.

<sup>10</sup> *People v. State Ins. Co.*, 19 Mich. 392; *Re World's etc. Ins. Co.*, 40 Barb. (N. Y.) 499.

<sup>11</sup> *State v. Mathews*, 44 Mo. 523; *Commonwealth v. Hock A. Mut. B. Assn.*, 10 Phila. (Pa.) 554.

<sup>12</sup> *People v. National F. Ins. Co.*, 27 Hun (N. Y.), 188, under N. Y. Act, June 1, 1880.

<sup>13</sup> *Commonwealth v. Germania L. Ins. Co.*, 11 Phila. (Pa.) 553.

<sup>14</sup> *State v. New England Mut. Ins. Co.*, 43 La. Ann. 133; 8 S. Rep. 888, under La. Act 101, 1886, sec. 7 (act is constitutional); *City of Columbus v. Hartford Ins. Co.*, 25 Neb. 83; 41 N. W. Rep. 140, under Neb. Laws, 1887, c. 66; *New Orleans v. Salamander Co.*, 25 La. Ann. 650; *Ætna F. Ins. Co. v. Reading*, 5 Pa. (L. ed.) 570; 11 Cent. Rep. 858, under Pa. Act, 1873, April 4th, repealed act May 24, 1887. As to division of companies into several classes and graduation according to amount of premium received, see *State v. Liverpool etc. Ins. Co.*, 40 La. Ann. 463; 4 S. Rep. 504. License tax on insurance companies need not be equal and uniform as to all companies: *State v. Liverpool etc. Ins. Co.*, 40 La. Ann. 463; 4 S. Rep. 504. Power of commissioner of insurance to grant license or revoke is only ministerial, and not judicial: *Hartford F. Ins. Co. v. Commissioners*, 70 Mich. 485; 38 N. W. Rep. 474.

<sup>15</sup> Notes and bills representing money loaned at interest are "property": *City of New Orleans v. Mechanics' etc. Ins. Co.*, 30 La. Ann. 876; 30 Am. Rep. 232. Foreign corporations are not taxable for premiums uncollected: *Railey v. Board of Assessors*, 44 La. Ann. 765; 11 Am. St. Rep. 93. Income tax provided by acts of Congress, June 30, 1864, and July 13, 1866, on premiums, assessments, etc., is not direct tax, but duty or excise: *Pacific Ins. Co. v. Soule*, 7 Wm. (U. S.) 433. Mutual insurance companies are liable to taxation on amount of their capital or accumulated premiums the same as other companies: *Sun Mut. Ins. Co. v. Mayor etc.*, 8 Barb. (N. Y.) 450; 8 N. Y. 241. Mutual life insurance company is taxable in town where principal place of business is for stocks, bonds, and other securities in which its funds and earnings have been invested: *Rev. Stat. Me.*, c. 6, sec. 13;

ings for the dissolution of insurance companies,<sup>16</sup> for obtaining the appointment of receivers of insolvent companies,<sup>17</sup> and for

*City of Portland v. Union Mut. L. Ins. Co.*, 9 Atl. Rep. 613. As to taxation of capital of mutual company, see *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241; *Colt v. Connecticut M. L. Ins. Co.*, 36 Conn. 512; *Mutual L. Ins. Co. v. Jenkins*, 16 N. Y. 424. Capital stock invested in United States bonds are not exempt from taxation under law of N. Y. 1880, c. 542; amended by-laws 1881, c. 361; *Home Ins. Co. v. New York*, 119 U. S. 129; 8 Sup. Ct. 1385 (court divided). Whether inequality is produced in singling out for taxation: *Cooley on Taxation*, 129; *Franklin Ins. Co. v. State*, 5 W. Va. 349. What classes of property of insurance companies are liable to be taxed under Kentucky Statutes authorizing their taxation by municipal corporations: *Kenton etc. Co. v. City of Covington*, 86 Ky. 213; 5 S. W. Rep. 461. As to taxation of English joint stock insurance companies, see *Oliver v. London etc. Ins. Co.*, 100 Mass. 531. Surplus profits of a mutual company are not taxable under English Income Tax Act 1853: *Sched. D. New York L. Ins. Co. v. Styles (Eng. H. of L.)*, 42 Balt. Under 84. Taxation of surplus, see *State v. Parker*, 34 N. J. L. 479; 35 N. J. L. 574. State tax upon entire amount of premiums received by company does not conflict with federal constitution: *Insurance Co. of North America v. Commonwealth*, 87 Pa. St. 173; 30 Am. Rep. 352. Under Massachusetts Act 1864, c. 208, and Stat. 1865, c. 283, as to whether tax on capital stock of mutual life insurance companies cannot be taxed on unredeemed guarantee capital: *Commonwealth v. Berkshire etc. Ins. Co.*, 98 Mass. 25. Under Michigan Acts 200, Pub. Acts, 1891, secs. 2, 4, mortgages held by insurance companies upon which they pay taxes are to be deducted from net assets: *Standard L. & A. Co. v. Board of Assessors*, 91 Mich. 78; 95 Mich. 466; 52 N. W. Rep. 17. Earned premiums are taxable as personal property under Comp. Stat. Neb., 1885, c. 77; Stat. 1885, c. 13, sec. 26; *Phoenix Ins. Co. v. City of Omaha*, 23 Neb. 312; 36 N. W. Rep. 522. Liability of company to pay losses may not be deducted from assets or property liable to taxation: *Kenton Ins. Co. v. City of Covington*, 86 Ky. 213; 5 S. W. Rep. 461. Amount to which stockholders would be entitled, on distribution of money and credits due them and found reserved, to pay or reinsure policy holders, may be deducted from taxable property under Iowa Code, sec. 814: *Equitable L. Ins. Co. v. Board of Equalization*, 74 Iowa. 178; 37 N. W. Rep. 141. Tax is property and not a franchise tax, under N. J. Act, April 11, 1886, Rev. 1156, 15, et seq.: *Merchants' Ins. Co. v. City of Newark*, 54 N. J. L. 138; 23 Atl. Rep. 395.

<sup>16</sup> Act of Ill., Feb. 17, 1874, providing for dissolution of insurance companies, is constitutional: *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 82. Court of equity has power to decree dissolution of a mutual benefit society where it violates a statute in the conduct of its affairs: *Chicago Mut. L. Assn. v. Hunt*, 127 Ill. 257; 20 N. E. Rep. 55.

<sup>17</sup> *Attorney-General v. Atlantic Mut. Ins. Co.*, 77 N. Y. 336; *Jer-*



instituting proceedings for an injunction to restrain companies from continuing their business, and for winding up the company's affairs when a continuance of its business would be hazardous to the policy holders or the public.<sup>18</sup>

**§ 328. Same Subject—Foreign Companies.**—The legislature has power to prescribe the conditions upon which foreign insurance companies shall be permitted to transact business within its territory, and effect will be given such statutes in all the courts of the United States,<sup>19</sup> and it may prohibit foreign companies from transacting business within its territory and enforce its prohibition by penal enactments.<sup>20</sup> It is held that

*main v. Hendricks* (N. Y. 1885), under sec. 7, c. 902, Laws 1869. Under this act the court may direct receivers to continue business: *People v. Atlantic Mut. Ins. Co.*, 15 Hun (N. Y.), 84; 100 N. Y. 279. Appointment of Receiver under New York Act, 1836, does not dissolve corporation: *Receiver of Globe Ins. Co.*, 6 Paige (N. Y.), 106.

<sup>18</sup> *Chicago L. Ins. Co. v. Auditor*, 101 Ill. 82; decided under Ill. Act, Feb. 17, 1874; *Fry v. Charter Oak etc. Co.*, 31 Fed. Rep. 197; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150; 25 N. E. Rep. 680, decided under Ill. Rev. Stat. 1889, c. 73, sec. 103, holds that such act is not in violation of contract clauses of federal constitution

<sup>19</sup> *Ehrmann v. Teutonia Ins. Co.*, 1 Fed. Rep. 471, 477; *List v. Commonwealth*, 118 Pa. St. 322; 12 Atl. Rep. 277; *State v. Phipps*, 50 Kan. 69; 34 Am. St. Rep. 152; *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204; 13 N. E. Rep. 705; *Fire Department v. Helfenstein*, 16 Wis. 136; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Hartford F. Ins. Co. v. Commissioners of Insurance*, 70 Mich. 485; 3 Kent's Commentaries, 18th ed. 257, note b; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Columbian F. Ins. Co. v. Kinyon*, 37 N. J. L. 33; *Farmers' and Mechanics' Ins. Co. v. Harrah*, 47 Ind. 236. Under Indiana statutes, District of Columbia is a "state," so far as foreign insurance companies are concerned. *State v. Briggs*, 116 Ind. 55; 18 N. E. Rep. 395. It is held in Michigan that the conditions as to transacting business may be reasonable or unreasonable: *Hartford F. Ins. Co. v. Commissioner of Insurance*, 70 Mich. 485. Statute of Indiana is constitutional: *Blackmer v. Royal Ins. Co.*, 115 Ind. 291; 17 N. E. Rep. 580. But such acts do not prevent transacting business not in the line of insurance: *Boulware v. Davis*, 90 Ala. 207; 9 L. R. Annot. 601; 8 S. Rep. 84.

<sup>20</sup> *Moses v. State*, 65 Miss. 562; 3 S. Rep., under Code Miss. 1890, secs. 1073-81; *Philadelphia F. Assn. v. New York*, 119 U. S. 110; *Pierce v. People*, 106 Ill. 11; 46 Am. Rep. 683; *Doyle v. Continental F. Ins. Co.*, 94 U. S. 537; *Norfolk etc. R. R. v. Pennsylvania*, 136 U. S. 114, 118; *Cincinnati Mut. etc. Co. v. Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626; *Horn Silver M. Co. v. New York State*, 143 U. S. 305, 314, per Field. J. The penalties are visited on resident agent: *State v. New York L.*

the legislature may restrict the business of such corporations to particular localities, and may require security for the performance of its contracts as shall be deemed for the best interests of its own citizens, since a foreign corporation has no absolute right of recognition in other states.<sup>21</sup> A corporation is a mere creature of local law; it can have no legal existence beyond the limits of the state of its creation, and is entitled to no recognition in other states, except upon the principle of comity. It is not a citizen within those clauses of the federal constitution which provide for citizens of each state all the privileges and immunities of citizens in the several states.<sup>22</sup> The state may also prescribe the manner in which the agents of such companies shall be qualified before entering on their duties.<sup>23</sup> Statutes prohibiting foreign insurance companies from carrying on business except on compliance with prescribed conditions, such as obtaining a license therefor, etc., do not conflict with the guarantee under the federal constitution of privileges and immunities to citizens in the several states;<sup>24</sup> nor do such statutes conflict with the statutes providing that Congress shall have power to regulate commerce with foreign nations and between the states, since issuing a policy of insurance is not commerce, notwithstanding the domicile of the parties be in different states.<sup>25</sup> Nor is marine insurance commerce, or an instrumentality thereof, but is merely an inci-

Ins. Co., 81 Mo. 89; *Smith v. State*, 18 Tex. App. 60; *State v. Charter Oak L. Ins. Co.*, 9 Mo. App. 364. See note to *Talbot v. Fidelity & Casualty Co.*, 13 L. R. Annot. 684. See *Haggin v. Comptoir D'Escompte de Paris*, 23 Q. B. Div. 519.

<sup>21</sup> *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 538, 589.

<sup>22</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168. See *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 538. See 2 Morawetz on Corporations, sec. 973; 1 Thompson on Corporations, sec. 12.

<sup>23</sup> *List v. Commonwealth*, 118 Pa. St. 322; 12 Atl. Rep. 277; *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204; 13 N. E. Rep. 706, under Rev. Stat. Ind. 1881, sec. 3768. Massachusetts Rev. Stat., c. 37, sec. 40, requiring deposit by agent of foreign company of copy of charter, etc., applies to mutual companies: *General etc. Ins. Co. v. Phillips*, 13 Gray (Mass.), 90. See notes in Jones on Business Corporations, 106, et seq.

<sup>24</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Tatem v. Wright*, 23 N. J. L. (3 Zab.) 429.

<sup>25</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168.

dent, and the state has power to prescribe and enforce conditions upon which foreign companies may transact business, notwithstanding the constitutional provision as to interstate commerce.<sup>26</sup> There is a distinction, with reference to the power to contract, between the existence of a corporation *de facto* and *de jure*. A valid contract cannot be made with a corporation that does not exist as a matter of fact at the time of contracting, and it must be shown that the corporation was in existence *de facto* at the time of entering into the contract. But a contract can be entered into with a corporation actually in existence at the time, although the legality of its organization may be questioned or its acts forbidden by law. The question of the legal validity of such a contract will be one to be determined by the courts, dependent upon the terms of the prohibition.<sup>27</sup> The principal object of such statutes is the pro-

<sup>26</sup> *Hooper v. California*, 155 U. S. 648; 15 Sup. Ct. Rep. 207; 40 Cent. L. J. 228. The court, per White, J., said. "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.' The State of California has the right to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entries shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as a preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company. And she has, also, the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate and enforce all legislation. In regard to things done within the territory of the state, which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the constitution of the United States."

<sup>27</sup> This is substantially the rule laid down in the learned treatise of Mr. Morawetz on *Private Corporations*, 2d vol., 2d ed., secs. 744-46. He also says: "The courts have, in some instances, failed to bear in

tection of the interests of its own citizens by the state. The legislature may also provide for the supervision of such corporations, as in case of domestic corporations. These statutes provide that certain acts be done by agents of such companies as prerequisites to making contracts within the state.<sup>28</sup> They further provide for a license tax or fee,<sup>29</sup> for taxation,<sup>30</sup> for a de-

mind the distinction between the actual existence of a corporate association, and the legality of such an association after it has been actually formed. It seems to have been assumed in some of the cases that a corporate association formed in violation of the general rule of the common law prohibiting such associations must necessarily be treated by the courts as a nullity—as no corporation at all. This doctrine is not only founded on a misconception, but is in most cases unjust in its consequences": *Id.*, sec. 745; and in a prior section he says: "The unauthorized dealings of such associations will, in many instances, be recognized and given effect by the courts, notwithstanding the common-law prohibition": *Id.*, sec. 744.

<sup>28</sup> *Washington Co. Mut. Ins. Co. v. Hastings*, 2 Allen (Mass.), 398.

<sup>29</sup> *Ætna F. Ins. Co. v. Reading*, 119 Pa. St. 417; 5 Pa. (L. ed.) 570; 11 Cent. Rep. 858; 13 Atl. Rep. 451, under acts Pa. April 4, 1873, sec. 17 (Pub. L. 20), May 24, 1887 (Pub. L. 204). Agent for soliciting and placing insurance is not, under La. Acts, 1886, No. 101, sec. 7, liable for license fee: *State v. Woods*, 40 La. Ann. 175; 3 S. Rep. 543; *State v. New England Mut. Ins. Co.*, 43 La. Ann. 133; 8 S. Rep. 868.

<sup>30</sup> When taxation is a revenue and not intended as a condition under Pub. Act, Mar. 3, 1885: *San Francisco v. Liverpool L. & G. Ins. Co.*, 74 Cal. 113; 15 Pac. Rep. 380. A foreign corporation has no status as a citizen in other states, and cannot object that the tax is not uniform: *Phoenix Ins. Co. v. Commonwealth*, 5 Bush (Ky), 68; 96 Am. Dec. 331; *Ducat v. City of Chicago*, 48 Ill. 172; 95 Am. Dec. 529. But see *Erie Ry. Co. v. State*, 31 N. J. L. (2 Vroom) 531; 86 Am. Dec. 226. Legislature may discriminate as to taxation between domestic and foreign corporations when the policy and interest of the state demand it. *Ducat v. City of Chicago*, 48 Ill. 172; 95 Am. Dec. 529. But see *Erie Ry. Co. v. State*, 31 N. J. L. (2 Vroom) 531; 86 Am. Dec. 226. The Act Rev. Stat. Ind., sec. 3773, is constitutional, whether such moneys be regarded as taxes for revenue or as license fees: *State v. Insurance Co. of North America*, 115 Ind. 257; 15 West. Rep. 93; *Tenn. Act*, Jan. 29, 1879, secs. 7, 53. Amended Laws 1881, c. 85, sec. 18, does not impose a tax upon foreign insurance companies, but on the agents who do business in that state, and is not affected by the revenue Acts of 1887, 1889, and 1891, providing for a payment by such companies of a certain per cent in lieu of taxes: *City of Memphis v. Carrington*, 91 Tenn. 511; 19 S. W. Rep. 673. Foreign corporation is not liable for taxation of capital invested in United States bonds: *International L. Assur. Co. v. Commissioners*, 28 Barb. (N. Y.) 318; *Laws N. Y.* 1855, c. 37.

posit with the state,<sup>31</sup> for procuring a certificate of authority from the state,<sup>32</sup> for an annual statement of the company's financial condition,<sup>33</sup> for the possession of certain assets,<sup>34</sup> for contributions to fire departments or fire companies of cities, or to exempt firemen's benevolent funds,<sup>35</sup> for the revocation of licenses,<sup>36</sup> for the appointment of some person on whom papers may be served in actions, suits, or proceedings commenced by

<sup>31</sup> *Cooke v. Warner*, 56 Conn. 234; 14 Atl. Rep. 798; *Fidelity & Casualty Co. v. Hahn*, Supt. Ins. (Ohio, 1895) 33 Week. L. Bull. 286. Such law is constitutional.

<sup>32</sup> *Jones' Business Corporation Laws of New York*, 105, 106; *Knapp etc. Co. v. National etc. Co.*, 30 Fed. Rep. 607; *Cincinnati Mut. H. A. Co. v. Rosenthal*, 55 Ill. 90. Under Tenn. Code, sec. 2575, the action of the commissioner is judicial: *State v. Thomas*, 88 Tenn. 491; 12 S. W. Rep. 1094. Contra, *Hartford F. Ins. Co. v. Commissioner of Insurance*, 70 Mich. 485. Under N. Y. Laws, 1881, c. 256, giving certificate to do business is within superintendent's discretion, and not reviewable by mandamus. In *Re Hartford L. & Ann. Ins. Co.*, 63 How. Pr. (N. Y.) 54. That such act is within control of the court, and may be reviewed under Kan. Laws, 1889, c. 159; see *Kansas Home Ins. Co. v. Wilder*, 43 Kan. 731; 23 Pac. Rep. 1061.

<sup>33</sup> *American Ins. Co. v. Story*, 41 Mich. 385; 1 N. W. Rep. 338.

<sup>34</sup> Under Rev. Laws of Vt., sec. 3607, Amended Act 1884, No. 45, applies also to mutual or co-operative companies: *Granite State Mut. A. Assn. v. Porter*, 58 Vt. 581.

<sup>35</sup> So under Wis. Rev. Stat., c. 65; *Fire Department v. Helfenstein*, 16 Wis. 136. Legislature has power to impose such burden: *Fireman's etc. Assn. v. Lounsbury*, 21 Ill. 511; 74 Am. Dec. 115. Such act is not unconstitutional, as granting an exclusive privilege or as giving money of the state to a private undertaking or as a tax: *Trustees of Exempt Firemen's Fund v. Roome*, 93 N. Y. 313; 45 Am. Rep. 217. See *Fire Department of Troy v. Bacon*, 2 Abb. App. Dec. (N. Y.) 127. The act of March 3, 1885, Stats. 1885, c. 15, providing for such payment, is unconstitutional under the constitution of California, art. 11, sec. 12: *City and County of San Francisco v. Liverpool, etc. Ins. Co.*, 74 Cal. 113; 15 Pac. Rep. 380. The same is true under Neb. Const., sec. 7, art. 9; *State v. Wheeler*, 33 Neb. 563; 50 N. W. Rep. 770.

<sup>36</sup> *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485; 38 N. W. Rep. 474. Under Mich. Pub. Acts, 1887, No. 285, revocation by the commissioner is ministerial act; only the commissioner, under Cal. Act, March 26, 1869, may require insolvent insurance to repair its capital stock without revoking its certificate: *Palache v. Pacific Ins. Co.*, 42 Cal. 419. Where a company is doing business against absolute prohibition of law, license may be revoked, although the cause is not specified in statute: *National L. Ins. Co. v. Commissioner of Insurance*, 25 Mich. 321.

or against the company.<sup>37</sup> Statutes of the character of the last are held to apply to actions growing out of the ordinary business of insurance, and not to other actions on contract.<sup>38</sup> They also amount substantially to a consent on the part of foreign insurance companies to be sued in the courts of the state where they are doing business,<sup>39</sup> and some tribunals have held that such acts confer exclusive jurisdiction on the courts of the

<sup>37</sup> Oregon Code, secs. 3276, 3277. Service on auditor is good service: *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471. Foreign insurance companies are not included under Ark. Stat., April 4, 1887, c. 135, requiring foreign corporations generally to designate agent. *St. Louis I. M. & S. R. Co. v. Commercial U. Ins. Co.*, 139 U. S. 223; 11 Sup. Ct. Rep. 523; 35 L. ed. 154. The Mich. Stat. Comp. L. 1871, sec. 1683, Laws 1873, p. 206, only applies to courts of record, and not to justices' courts: *Hartford Ins. Co. v. Owen*, 30 Mich. 441. Service may be made on state auditors: *Rehm v. German etc. Inst.*, 125 Ind. 135; 25 N. E. Rep. 173. Under Ind. Stat., Elliott's Supp., secs. 993, 994, exempts foreign insurance companies from provisions of Rev. Stat. Ind. 1881, secs. 316, 3022, 3023, in regard to service on foreign corporations in general. The Act of Maryland, 1878, c. 106, is exclusive, and general corporation act does not apply: *Oland v. Agricultural Ins. Co.*, 69 Md. 248; 12 Cent. Rep. 881. Appointment under N. Y. Laws, 1884, c. 346, of "superintendent of insurance or his successor in office," is valid, and extends to an incumbent of office and his successors: *Laffin v. Travelers' Ins. Co.*, 121 N. Y. 713; 31 N. Y. 900; 24 N. E. Rep. 934. Service on designated attorney gives court jurisdiction: *Gibbs v. Queen Ins. Co.*, 63 N. Y. 114; 20 Am. Rep. 513. Service on superintendent gives jurisdiction on city court of New York: *People's F. Ins. Co. v. New York City Justices*, 33 N. Y. 147. Mutual insurance companies are within the Indiana statute requiring designation of agent to receive service of papers: *Lamb v. Lamb*, 13 Bank. Reg. 17. Where foreign insurance company has complied with act Mo. 1874, p. 74, sec. 25, which repealed Wagner's Mo. Stat. 770, sec. 25, delivery of writ to local agent is not sufficient: *Balle v. Equitable F. Ins. Co.*, 68 Mo. 617. It will be presumed that the company has complied with the law, and judgment will be entered on service on the commissioner, although he refuses to accept service: *Knapp etc. Co. v. National Mut. F. Ins. Co.*, 30 Fed. Rep. 607. When secretary of mutual insurance association is agent to receive service of process under Rev. Stat. Wis., sec. 2637, subd. 9, and section 1977: *Dixon v. Order Railway Conductors etc.*, 49 Fed. Rep. 910.

<sup>38</sup> *Rehm v. German etc. Inst.*, 125 Ind. 135; 25 N. E. Rep. 173. See also, sec. 270, herein.

<sup>39</sup> *Rehm v. German etc. Inst.*, 125 Ind. 135; 25 N. E. Rep. 173. See, *Railroad Co. v. Harris*, 12 Wall. (U. S.) 65; *Cunningham v. Southern Express Co.*, 67 N. C. 425; *Ex parte Schollenberger*, 96 U. S. 369; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404.

state.<sup>40</sup> But the United States supreme court<sup>41</sup> decides that such a statute, so far as it requires an agreement against the removal of suits into the federal courts, is repugnant to the constitution of the United States, and such an agreement would be void. So in an earlier Wisconsin case<sup>42</sup> it was held that such an act did not deprive a foreign insurance corporation of its right to remove into the federal courts a suit commenced in that state against such company by a citizen thereof, and it is so decided in Massachusetts.<sup>43</sup> Some of the states have, however, enacted laws providing that the license of a foreign insurance company shall be revoked or suspended if such company make an application to remove a suit commenced in the state court to the United States district or circuit court.<sup>44</sup>

**§ 329. Foreign Companies' Retaliatory and Anti-compact Laws.**—A majority of the states have enacted what are known as retaliatory laws. By these laws one state imposes the same or like restrictions and conditions upon insurance corporations of other states doing business within its territory, as such other states impose upon its insurance corporations doing business therein.<sup>45</sup> Such acts have been held unconstitutional in Alabama, as not within the principle of uniformity of taxation, and as an unwarranted delegation of the legislative power of such state to other States.<sup>46</sup> But in Georgia an act<sup>47</sup> of this nature has

<sup>40</sup> New York L. Ins. Co. v. Best, 23 Ohio St. 105, under Laws 1872, 69 Ohio Laws, 155 sec. 18; People ex rel. Glens Falls Ins. Co. v. Judge of Jackson Circuit, 21 Mich. 577; 4 Am. Rep. 504. This case also holds that a writ of mandamus was not the proper remedy, even if the cause could be transferred: Morse v. Home Ins. Co., 30 Wis. 496; 11 Am. Rep. 580, under Wis. Stat. Laws 1870, c. 56, sec. 22. Overruled, see next note.

<sup>41</sup> Morse v. Home Ins. Co. (U. S. Sup. Ct.), 13 Am. Rep. 297; overruling same case, 30 Wis. 496; 11 Am. Rep. 580.

<sup>42</sup> Know v. Home Ins. Co., 25 Wis. 143.

<sup>43</sup> Morton v. Mutual L. Ins. Co., 105 Mass. 141; 7 Am. Rep. 505, and note, 507.

<sup>44</sup> See statutes compiled in Richards on Insurance, 582, **xxiv**.

<sup>45</sup> See statutes compiled in Richards on Insurance, 581, **xxiii**.

<sup>46</sup> Clark v. Mobile, 66 Ala. 217; 10 Ins. L. J. 357.

<sup>47</sup> Act 1869. See Laws 1887, p. 124, sec. 12.

been held to be constitutional and not repealed by subsequently enacted general tax laws;<sup>48</sup> and the retaliatory law of Indiana<sup>49</sup> is declared in that state to be constitutional, and not open to the objection that it is an attempt to levy different fees for the same privilege from different members of the same class. It is also held not to be an enactment of the statutes of one state into those of another, nor unconstitutional on the ground of uncertainty.<sup>50</sup> So in New York such statute is held not unconstitutional, although the amount required for taxes may be greater than that required by other laws of the same state.<sup>51</sup> If a foreign corporation has complied with the Minnesota laws,<sup>52</sup> it should not be excluded from doing business there where it is doubtful whether the laws of the state of incorporation of such company would prevent corporations of Minnesota from doing business there, and a judgment of ouster against such corporation will be refused in such a case.<sup>53</sup> In *State v. Moore*<sup>54</sup> it is held that the insurance commissioners

<sup>48</sup> *Goldsmith v. Home Ins. Co.*, 62 Ga. 379.

<sup>49</sup> Rev. Stat. Ind. 1883, sec. 3773. See Acts 1889, c. 760, sec. 2.

<sup>50</sup> *State v. Insurance Co.*, 115 Ind. 257; 17 N. E. Rep. 575; *Blackmer v. Royal Ins. Co.*, 115 Ind. 291; 17 N. E. Rep. 580.

<sup>51</sup> *People v. Fire Assn.*, 92 N. Y. 311; 44 Am. Rep. 380. See 3 R. S., 8th ed., p. 1617; Laws 1892, c. 690, sec. 38.

<sup>52</sup> Gen. Stat. 1878, c. 34, sec. 269. See Stat. 1891, vol. 1, sec. 2907.

<sup>53</sup> *State Attorney General v. Fidelity etc. Ins. Co.*, 39 Minn. 538; 41 N. W. Rep. 108. See Stat. 1891, vol. 1, sec. 2907. As to taxation, see *State v. Reilmund*, 45 Ohio St. 214; 13 N. E. Rep. 30, under Rev. Stat. Ohio, secs. 282, 2745. See Rev. Stat. 1890, sec. 282. The rule requiring an order, etc., to withdraw securities under Wagner's Mo. Stat., p. 769, sec. 20, is not affected by the fact that the state of incorporation of the foreign company does not require such order for such purpose: *State v. Gates*, 67 Mo. 496. See Rev. Stat. 1889, sec. 5932. For construction of Connecticut statutes, see *Croke v. Warner*, 56 Conn. 234; 14 Atl. Rep. 798. Deposit with state treasurer, see Gen. Stat. 1888, secs. 2835, 2913, and Pub. Laws, 1889, c. 95; Wis. Acts of 1879, c. 171, requiring insurance commissioner to revoke license of foreign company upon persistent violation of law regulating such corporations; and Wis. Rev. Stat., sec. 1974, providing that such company shall not issue any new policy after sixty days from rendition of final judgment against it, do not apply to appeal taken in good faith from final judgment: *State v. Spooner*, 47 Wis. 438. See Sanb. & B. Annot. Stat. 1889, vol. 1, sec. 1221.

<sup>54</sup> 39 Ohio St. 486, under 80 Ohio Laws, 180, sec. 3630 e. See Rev. Stat. 1890, sec. 282.



could not be compelled by mandamus to issue a certificate to a company organized in a state where Ohio companies were not permitted to carry on business on the same basis substantially as in Ohio. In an Illinois case<sup>55</sup> it is held that retaliatory legislation, which provides against future like legislation on the part of other states, does not become operative until the enactment by such other state of the laws so provided against. Some of the states<sup>56</sup> provide substantially that the license of any insurance company not organized under the laws of the state, but doing business therein, may be revoked if it shall enter into any compact or combination with other insurance companies, for the purpose of governing or controlling the rates charged for fire insurance on property within the state, and such an act is held constitutional in Michigan.<sup>57</sup>

**§ 330. Foreign Companies—what Constitutes “Doing Business,” etc.**—As has been stated, the object of legislation regarding foreign insurance companies seems to be the protection of the interests of the citizens of the legislating state, and certain of the statutory provisions above referred to are substantially conditions precedent to doing insurance business by such companies in states other than the one of incorporation. Therefore, the question of what constitutes doing an insurance business or making contracts becomes important. It is held that taking an application for a policy, and forwarding it to the home office of the company in another state, is not doing insurance business.<sup>58</sup> So an agent who keeps his office and car-

<sup>55</sup> *Germania Ins. Co. v. Swigert*, 128 Ill. 237; 21 N. E. Rep. 530, under Stat. Ill. 1874, c. 73, sec. 29. See Cothran's Rev. Stat. 1891, p. 830, sec. 29; p. 833, sec. 55; p. 840 g, sec. 63 w.

<sup>56</sup> Ga. Laws 1890-91, vol. 1, p. 206; Kan. Gen. Stat. 1889, vol. 1, sec. 2499; Howell's Mich. Stat., Supp., 1883-89, sec. 4340 c.; N. H. Laws 1895, c. 93; Ohio Rev. Stat. 1892, sec. 3659.

<sup>57</sup> *Hartford F. Ins. Co. v. Raymond*, 70 Mich. 485; 38 N. W. Rep. 474, under Pub. Acts Mich. 1887, No. 285. See Howell's Stat., Supp., 1883-89, sec. 4340 c.

<sup>58</sup> *Hacheny v. Leary*, 12 Or. 40. “Not only the intent of the statute must be given effect, but the sweeping character of its penalty must be considered. This penalty extends to every contract. It applies to one transaction with as much force as it does to a hundred, and it reaches the case of a corporation that has no particular local-

ries on his business in another state is not required to take out a license in Alabama, because he issues policies on houses there, nor does the single act of examining one house there, with a view to effect insurance thereon, bring the agent within the statute of that state in relation to foreign companies;<sup>59</sup> nor does issuing a policy by a corporation of one state on property in another state constitute carrying on business in the latter state,<sup>60</sup> nor is adjusting a loss by an uncertified agent of a foreign insurance company "transacting the business" of insurance.<sup>61</sup> But it is held that taking a note for an installment of premium and transmitting it to the company is "doing insurance business,"<sup>62</sup> and although a foreign company makes a voluntary assignment of its property, it will be considered as "doing business" within the intent of the statute where such company has been transacting business in the state, although it ceases to take new risks;<sup>63</sup> and an agent who has received premiums for insurance, taken his commissions, advertised himself as agent, forwarded premiums to the insurance company, and received policies for delivery to the insured, is an agent of the company and a person aiding in the transaction of insurance business, under the Wisconsin statute, sufficiently so at least to give the court jurisdiction by the service of process upon him.<sup>64</sup>

**§ 331. Foreign Company Estopped to Avoid Contract by Setting up Noncompliance with Statutes.**—A foreign in-

ity for transacting corporate business here, as well as the case of one that has such a place of business, but is unwilling to comply with the terms of the statute. No foreign corporation, therefore, can rely upon enforcing any contract here made by it in the courts of this state, unless it obeys the statute": Jones' Business and Corporation Law, 111, 112.

<sup>59</sup> *Jackson v. State*, 50 Ala. 141, under Sess. Acts, 1868, p. 330, sec. 107. But see *State v. Beazley*, 60 Mo. 220.

<sup>60</sup> *Marine Ins. Co. v. St. Louis I. M. & S. R. Co.*, 41 Fed. Rep. 643; *New Orleans v. Virginia F. & M. Ins. Co.*, 33 La. Ann. 10.

<sup>61</sup> *People v. Gilbert*, 44 Hun (N. Y.), 522.

<sup>62</sup> *Thayer, J.*, dissenting; *Hacheny v. Leary*, 12 Or. 40.

<sup>63</sup> *Williams v. Commercial Ins. Co.*, 75 Mo. 388; *Relfe v. Commercial Ins. Co.*, 5 Mo. App. 173, under Wagner's Mo. Stat. 772.

<sup>64</sup> *State v. United States Mut. Acc. Assn.*, 67 Wis. 624; 31 N. W. Rep. 229, under Rev. Stat. Wis., sec. 1977.

insurance company cannot avail itself of its own turpitude in not complying with the statutes regarding insurance, to defeat an action against it on a policy. It is estopped, or at least prohibited, by the prohibition of the common law against unauthorized corporate action, from denying its authority to transact business as against innocent persons.<sup>65</sup>

**§ 332. When Contracts Valid although Company has not Complied with Statutes.**<sup>66</sup>—But preliminary contracts authorized to be entered into by an insurance company become valid on completing the organization as required by statute,<sup>66a</sup> and the presumption attaches that a company has been duly incorporated where a question arises between the receiver of a corporation and persons who have contracted with it as such,<sup>67</sup> nor is compliance with the statute as to transacting business necessary to enable a foreign insurance company to take securities in the state of Wisconsin for debts due them from residents thereof;<sup>68</sup> nor does such noncompliance invalidate the bond of an insurance agent,<sup>69</sup> and where the statute does not declare the transactions of the company void, in case of non-compliance with its provisions, a mortgage made by a foreign company will be upheld;<sup>70</sup> nor does it invalidate subscriptions

<sup>65</sup> *Clay Fire etc. Ins. Co. v. Huron etc. Co.*, 31 Mich. 346; *Watertown F. Ins. Co. v. Rust*, 141 Ill. 851; 30 N. E. Rep. 772, under Rev. Stat. 1887, c. 73, sec. 124; *Gausser v. Fireman's F. Ins. Co.*, 34 Minn. 372; *Swan v. Watertown F. Ins. Co.*, 96 Pa. St. 37; *Watertown F. Ins. Co. v. Simons*, 96 Pa. St. 520. See next section. See, also, as to general rule, 2 Morawetz on Private Corporations, 2d ed., sec. 752. As to estoppel of corporation to plead that contract is ultra vires, see note 13 Am. Dec. 108. For cases where insurance company may set up ultra vires, see *Hambro v. Hull etc. Ins. Co.*, 3 Hurl. & N. 789; *Webster v. Buffalo Ins. Co.*, 2 McCrary (C. C.) 348. When it is estopped, see *Gray v. National B. Assn.*, 111 Ind. 531. And see generally, 5 Thompson on Corporations, ed. 1894, sec. 6015, et seq., and sec. 334, herein.

<sup>66</sup> See sec. 1452, herein.

<sup>66a</sup> *Williams v. Babcock*, 25 Barb. (N. Y.) 109. See *Daly v. National etc. Ins. Co.*, 64 Md. 1; *National Mut. F. Ins. Co. v. Pursell*, 10 Allen (Mass.), 231.

<sup>67</sup> *White v. Coventry*, 29 Barb. (N. Y.) 305.

<sup>68</sup> *Charter Oak L. Ins. Co. v. Sawyer*, 44 Wis. 387.

<sup>69</sup> *United States L. Ins. Co. v. Adams*, 7 Bliss. (C. C.) 30.

<sup>70</sup> *Northwestern etc. L. Ins. Co. v. Overholt*, 4 Dill. (C. C.) 287.

to the stock of such corporations, or notes given in payment therefor. Such contracts are not "taking risks" nor "transacting any business of insurance."<sup>71</sup> So it has been held<sup>72</sup> that a statute requiring a certified copy of articles of association to be filed with the county clerk did not affect the validity of contracts, as it was intended merely to furnish proof of corporate existence.<sup>73</sup> In Massachusetts, it is held that a foreign company may make a valid contract of insurance there,<sup>74</sup> and under a statute providing that suits may be brought against foreign companies upon any contract made and delivered in the state, an action may be maintained on a policy delivered by an agent of the company within the state.<sup>75</sup> And in Michigan the statute does not apply to contracts made abroad upon property within the state, but only to operations therein.<sup>76</sup> In Arkansas, a failure to comply with the statutes relating to foreign insurance companies doing business in that state does not affect the validity of the policies issued by such company, but only renders the agents and brokers of such corporation liable to the penalties imposed by the statute.<sup>77</sup> So in Indiana, a policy is held not to be void for non-compliance with such statute.<sup>78</sup> Nor is the policy void in Ohio under such circumstances, nor is the policy holder excused from payment of premiums under his contract,<sup>79</sup> and there are numerous cases which hold such policies valid and the premium or premium notes collectible.<sup>80</sup>

<sup>71</sup> *Bartlett v. Chouteau Ins. Co.*, 18 Kan. 369.

<sup>72</sup> *Jhous v. People*, 25 Mich. 499, under Mich. Sess. Laws 1859, p. 1083, sec. 9.

<sup>73</sup> *Jhous v. People*, 25 Mich. 499. See, also, *American Ins. Co. v. Butler*, 70 Ind. 1.

<sup>74</sup> *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray (Mass.), 204.

<sup>75</sup> *Burns v. Provincial Ins. Co.*, 35 Barb. (N. Y.) 525.

<sup>76</sup> *Clay F. Ins. Co. v. Huron Salt etc. Co.*, 31 Mich. 346, under Mich. Stat. Comp. L. 1871, sec. 1683.

<sup>77</sup> *Ehrmann v. Teutonia Ins. Co.*, 1 McCrary (C. C.) 123.

<sup>78</sup> *Behler v. German Mut. F. Ins. Co.*, 68 Ind. 347. But see next section.

<sup>79</sup> *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67. But see next section.

<sup>80</sup> *Hartford L. S. Ins. Co. v. Matthews*, 102 Mass. 221; *Insurance Joyce*, Vol. 1—27

§ 333. **When Contracts not Valid where Company has not Complied with Statutes.**—Notwithstanding some of the cases in the last section hold that a noncompliance with statutes regulating the business of insurance companies does not invalidate the contract, there are numerous decisions which hold, that where the contracts are made within the state a strict compliance with such statutes is necessary to the validity of the contract. And it would seem reasonable, in view of what has been stated in the preceding sections herein, that it would necessarily follow that a contract made in violation of or noncompliance with such laws could not be valid, or at least should be voidable on principle.<sup>81</sup> The decisions, however, are not unanimous, and it is extremely difficult to state any positive governing rule. In Illinois, it is held that a foreign corporation cannot enforce such a contract, nor recover on a note given for stock and premiums, notwithstanding the law imposes a penalty for doing business in the state in violation of the statutory provisions relating thereto.<sup>82</sup> And in Nebraska a premium note given to a foreign insurance company, which has not acquired the right to do business in the state, is not enforceable.<sup>83</sup> So it is held in Vermont that an insurance contract is void when made by a foreign company before it has complied with the statute, obtained a license, and filed a copy of its by-laws with the secretary of state, and become responsible for the acts and neglects of its agents,<sup>84</sup> and such company can maintain no action on a contract made before compliance with a statute requiring the company to file a statement of its condition.<sup>85</sup> In Massachusetts, the statute prohibits the "making of any contract of insurance within the state," unless certain statutory conditions have been complied with, and it has been decided in

Co. v. Whipple, 61 N. H. 61; Provincial Ins. Co. v. Lapsley, 15 Gray (Mass.), 262; Behler v. German Ins. Co., 68 Ind. 347, overruling Sun Ins. Co. v. Slaughter, 20 Ind. 520; Clark v. Middleton, 19 Mo. 53.

<sup>81</sup> Williams v. Cheney, 3 Gray (Mass.), 215 and following cases in this section.

<sup>82</sup> Cincinnati Mut. H. Assn. v. Rosenthal, 55 Ill. 85; 8 Am. Rep. 626.

<sup>83</sup> Barbor v. Boehm, 21 Neb. 450.

<sup>84</sup> Lycoming F. Ins. Co. v. Wright, 55 Vt. 526.

<sup>85</sup> Aetna Ins. Co. v. Harvey, 11 Wis. 394.

that state that a noncompliance with such requirements prevents recovery on a premium note given a mutual company.<sup>86</sup> In a case in Illinois it appeared that after publishing notice and filing an intention to organize an insurance company, the persons so intending secured an application for insurance and a premium note payable to the company, which they presented to the state auditor, and on the day of the loss made the oath required by statute, and it was held that as at the time of the contract the corporation had no legal existence, it could not be bound thereby.<sup>87</sup> It is also held that the failure to comply with the requirements of a statute prescribing the terms upon which foreign insurance companies may do business in a state, such companies and their agents and brokers render themselves liable to the penalties denounced by the act, but such failure does not affect the validity of the policies issued by them, or in any manner operate to the prejudice of the policy holder.<sup>88</sup> So in Indiana, there are cases which hold such contracts void, both as to the foreign company and its agents, and the insured may sustain an action to recover back his premium, and may do this independent of the doctrine of recovering back the consideration upon the rescission of a contract;<sup>89</sup> and it has also been decided there that a premium note cannot be enforced in the state where no certificate has been issued to the agent of a foreign company, as required by the statute, to enable him to transact business.<sup>90</sup> So in Pennsylvania,

<sup>86</sup> *Washington Mut. Ins. Co. v. Hastings*, 2 Allen (Mass.), 398; *Jones v. Smith*, 3 Gray (Mass.), 500. But see *National M. F. Ins. Co. v. Pinsel*, 10 Allen (Mass.), 232. In this case it appeared that statute provided that the contract should be valid, though provisions of statute were not complied with: *Leonard v. Washburn*, 100 Mass., 251.

<sup>87</sup> *Gent v. Manufacturers' etc. Ins. Co.*, 107 Ill. 652; s. c., 13 Ill. App. 308. See *American Ins. Co. v. Story*, 41 Mich. 388.

<sup>88</sup> *Ehrman v. Teutonia Ins. Co.*, 1 Fed. Rep. 471, citing *Union Mut. Ins. Co. v. McMillen*, 24 Ohio St. 67; *Clay F. Ins. Co. v. Huron Salt Co.*, 31 Mich. 346; *Columbus Ins. Co. v. Walsh*, 18 Mo. 229; *Lamb v. Bowser*, 7 Biss. C. C. 315; s. c., Id. 372; *Hartford L. S. Ins. Co. v. Matthews*, 102 Mass. 221.

<sup>89</sup> *Union Central L. Ins. Co. v. Thomas*, 46 Ind. 44. See *Farmers' etc. Ins. Co. v. Harrah*, 47 Ind. 236; *Charter Oak L. Ins. Co. v. Sawyer*, 44 Wis. 387. But see preceding section.

<sup>90</sup> *Hoffman v. Banks*, 41 Ind. 1.

a foreign insurance company cannot recover from the bondsmen of a subagent for his default, he not having been commissioned by the insurance commissioner as required by the statute of that state.<sup>91</sup>

**§ 334. Charter—Corporate Powers—Ultra Vires.—**

The charter of a corporation is the measure of its powers, and the enumeration of certain powers implies the exclusion of all others.<sup>92</sup> This rule, however, does not prohibit a corporation from exercising such powers as are requisite to carry on its business in a manner usual and necessary, for this it has authority to do;<sup>93</sup> but the rule does operate to restrain a corporation from engaging in transactions which are not calculated to effect the particular purpose for which it was incorporated.<sup>94</sup> An insurance company has no authority to invest its capital stock in another corporation under a statutory power to invest its money in "real or personal property, stocks, or choses in action";<sup>95</sup> and a contract whereby a guaranty life association undertakes to pay losses which may accrue against another and similar association is an attempt to divert the funds to objects not authorized by its charter, and is therefore ultra vires and void.<sup>96</sup> An insurance company can borrow money to pay a loss or give a note to raise the money for that purpose,<sup>97</sup> and in making a loan it may lawfully require the borrower to insure the prop-

<sup>91</sup> *Mutual B. L. Ins. Co. v. Bates*, 92 Pa. St. 352. See further what policy is void and note uncollectible, *Franklin Ins. Co. v. Louisville etc. Co.*, 9 Bush (Ky.), 590.

<sup>92</sup> *State v. Atchison & N. R. Co.*, 24 Neb. 143; 38 N. W. Rep. 43.

<sup>93</sup> See *Whitewater etc. Co. v. Vallette*, 21 How. (U. S.) 424; *Ohio L. Ins. Co. v. Merchants' Ins. Co.*, 11 Humph. (Tenn.) 22; 53 Am. Dec. 742.

<sup>94</sup> See *Penobscot Corp. v. Lamson*, 16 Me. 224; 33 Am. Dec. 656; *Beatty v. Knowles*, 4 Pet. (U. S.) 162; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358; 8 Am. Dec. 243. This rule with its qualifications is fully considered in *Morawetz on Private Corporations*, ed. 1882, secs. 189, 209. See, also, in index thereto "Ultra Vires," "Construction of Charter," and "Validity of Corporate Acts." See, also, *Angell & Ames on Corporations*, 9th ed., sec. 111.

<sup>95</sup> *Commercial etc. Ins. Co. v. Board of Revenue*, 99 Ala. 1; 42 Am. St. Rep. 17.

<sup>96</sup> *Twiss v. Guaranty L. Assn.*, 87 Iowa, 733; 43 Am. St. Rep. 418.

<sup>97</sup> *Furniss v. Gilchrist*, 1 Sand. (N. Y.) 53.

erty with the company and to pay the premium in addition to the legal rate of interest.<sup>98</sup> It also has power to reject an application, and is not bound by a contract by its agent in retaining the premium note while endeavoring to induce it to reconsider its action.<sup>99</sup> Where the charter provided that an insurance company might issue policies on lives and grant annuities, and authorized the setting apart of a portion of its capital as security for the payment of annuities, it was held that the company might insure lives and grant annuities before making such appropriation of the fund.<sup>100</sup> Where the charter of a company authorized it to insure property "against loss or damage by fire, lightning, and inland navigation and transportation," a contract made by it, insuring horses against death by accident or disease, is void.<sup>101</sup> But it is held in Colorado that a fire insurance company could not avail itself of the defense of *ultra vires* when it had insured plaintiff's crop against loss from hail, and had received the premium therefor, even though the contract were *ultra vires*.<sup>102</sup> And a similar ruling has been made in Iowa, where it was held that a religious society insuring lives could not defend against a suit on one of its policies, upon the plea of *ultra vires*, when it had received assessments on the policy.<sup>103</sup> And an insurance company has no power to purchase upon credit the mortgage obligation of one insured by the company and entitled to indemnity for a loss, for the purpose of setting off such mortgage against the policy;<sup>104</sup> nor can such company treat as profits, subject to be divided, premiums received upon unexpired risks, when it has a fund sufficient, independent thereof, to meet all liabilities that might accrue on the pending risks, and dividends thus paid may be reclaimed by the corporation.<sup>105</sup>

<sup>98</sup> *New York F. Ins. Co. v. Donaldson*, 3 Edw. (N. Y.) 199.

<sup>99</sup> *Otterbein v. Iowa St. Ins. Co.*, 57 Iowa, 274.

<sup>100</sup> *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 84.

<sup>101</sup> *Rochester Ins. Co. v. Martin*, 13 Minn. 59. See *Burgess & Stock's case*, 31 L. J. Ch. 749; 2 J. & H. 441; *Natusch v. Irving*, in *Gow on Partnership*, app. ii.

<sup>102</sup> *Denver F. Ins. Co. v. McClelland*, 9 Col. 11; 59 Am. R. p. 134.

<sup>103</sup> *Matt v. Roman Catholic Mut. Soc.*, 70 Iowa, 455; 30 N. W. Rep. 799.

<sup>104</sup> *Kansas Ins. Co. v. Craft*, 18 Kan. 283.

<sup>105</sup> *Lexington etc. Ins. Co. v. Paige*, 17 B. Mon. (Ky.) 412.



§ 335. **Forfeiture of Charter.**—Where the legislature repeals a statute under which an insurance company is organized, and declares its charter forfeited except it comply with certain requirements, outstanding policies of the company are not canceled by such repealing act, notwithstanding the company fails to comply with the provision of such act,<sup>106</sup> and an insurance company does not forfeit its charter because of non-user, by refusing to insure against extrahazardous risks.<sup>107</sup>

<sup>106</sup> *Manlove v. Commercial Mut. F. Ins. Co.*, 47 Kan. 309; 27 Pac. Rep. 979.

<sup>107</sup> *Corwin v. Insurance Co.*, 14 Ohio, 6.

*Lloyds Associations and Lloyds Policy.*—A Lloyds voluntary association, consisting of natural persons merely, and unincorporated, cannot, it is held, be licensed to transact insurance business in Georgia: *Fort v. State*, 18 S. E. Rep. 14. See, also, *In re License in Pennsylvania*, 3 Pa. Dist. Rep. 822. In Ohio, however, such association has been held to so far act as a corporation that quo warranto will lie to oust it from the unlawful exercise of insurance business in that state: *State ex rel. Richards v. Ackerman*, 37 N. E. Rep. 828. A condition precedent in a Lloyds policy is void that an action at law shall be brought against attorneys in fact of the underwriters: *Faycon v. Fogg*, 73 N. Y. St. Rep. 522. Stipulation in a policy of Lloyds association that notice and proofs of loss shall be served upon the attorneys in fact of the underwriters, when complied with: *Walker v. Beecher*, 71 N. Y. St. Rep. 458. An agent who assists a guarantee and accident Lloyds, which is a voluntary unincorporated association, to do business, is held not guilty of any offense in Georgia: *Fort v. State*, 18 S. E. Rep. 14; see, also, *Commonwealth v. Reinocchl (Pa.)*, 29 Atl. Rep. 896; *Restrictions on Insurance Lloyds Associations*, 25 L. R. A. 238. When liability of several underwriters of a marine Lloyds policy is several and not joint: *Tyser v. Shipowners Syndicate*, 12 B. (1896) 135; 65 L. J. Q. B., N. S., 238.

## CHAPTER XV.

### PARTIES—MUTUAL COMPANIES.

- § 340. Mutual insurance companies defined.
- § 341. Mutual companies: Capital stock: Fund for payment of losses.
- § 342. Kinds of mutual insurance companies.
- § 343. Plans of mutual insurance companies.
- § 344. When mutual societies are and are not insurance companies.
- § 345. What societies are not insurance companies: Cases.
- § 346. What societies are insurance companies: Cases.

§ 340. **Mutual Insurance Companies Defined.**—A mutual insurance company is one in which the members mutually contribute to the payment of losses and expenses, where the benefit to accrue or indemnity is conditioned in any manner upon persons holding similar contracts. Such companies differ essentially from stock insurance companies. The former need many by-laws and conditions that are not required in stock companies, and each person who insures therein becomes a member of the association.<sup>1</sup> The statutes of some of the states define mutual insurance companies;<sup>2</sup> others exempt certain mutual benefit organizations from the insurance laws, although such societies might otherwise come within their operation.<sup>3</sup>

§ 341. **Mutual Companies—Capital Stock—Funds for Payment of Losses.**—The funds out of which damages and

<sup>1</sup> *Baxter v. Chelsea Mut. F. Ins. Co.*, 1 Allen (Mass.), 294; 79 Am. Dec. 730, under the general corporation law of New York, Laws 1892, c. 687. A membership corporation includes benevolent orders: *Jones' Business and Corporation Laws*, 87.

<sup>2</sup> Cal. Stat. 1891, c. cxvi, p. 126; sec. 14, p. 130.

<sup>3</sup> See Cal. Stat. 1891, c. cxvi, p. 126, sec. 14, p. 130; Ill. Stat. 1885, c. 32, sec. 31; Mass. Pub. Acts 1882, c. 115, secs. 8-10; Amendment, 1882, c. 193, sec. 2; Mo. Rev. Stat. 1879, secs. 972, 973; Wis. Laws, 1883, c. 94; Ohio Rev. Stat. 1880, sec. 3630. See cases in secs. 344-46, herein.

losses are to be paid are the premiums, the earnings in the business, and premium and deposit notes, which latter are a sort of reserve fund.<sup>4</sup> These usually constitute the capital of the company,<sup>5</sup> although an absolute reserve or safety fund may be provided, and all the notes, whether in one department or another, must be resorted to if necessity exists.<sup>6</sup> So where a mutual company is authorized to and does issue policies on the cash principle to other than its members, the premium notes of the members represent the capital stock of the company to such other insurers.<sup>7</sup> So parol evidence is admissible to show whether a note executed prior to the completion of the organization, and in form like those required to form part of the capital, was intended to and did constitute a part thereof.<sup>8</sup> But a guaranty fund in approved notes to be used only in paying claims, and any part so used to be refunded out of the first surplus receipts, cannot be reckoned as assets in determining whether the company is solvent;<sup>9</sup> nor can a premium note be treated by a receiver of the company as capital, and the whole note collected, regardless of losses.<sup>10</sup> But it is held in another case that a note for premiums in advance passes to the receiver of a company on its becoming insolvent,<sup>11</sup> but the notes advanced to the company by intending insurers do not constitute the makers stockholders;<sup>12</sup> and if a note be proven to be a capital stock note, given, taken, and used as such, on the organization of the company, the whole amount may be recovered without an assessment.<sup>13</sup> Where a mutual insurance company has deposited securities with the state treasurer, under a statutory requirement therefor, it has no absolute right to collect the income therefrom. But the treasurer may grant permission to

<sup>4</sup> *Planters' Ins. Co. v. Comfort*, 50 Miss. 662, 668.

<sup>5</sup> *Id.*

<sup>6</sup> *Sands v. Sanders*, 28 N. Y. 416.

<sup>7</sup> *Hays v. Lycoming F. Ins. Co.*, 98 Pa. St. 184.

<sup>8</sup> *Dana v. Munson*, 23 N. Y. 564.

<sup>9</sup> *Russell v. Bristol*, 49 Conn. 251.

<sup>10</sup> *Bell v. Shipley*, 33 Barb. (N. Y.) 610. See *Farmers' Ins. Co. v. Smith*, 63 Ill. 187.

<sup>11</sup> *Cruikshank v. Brouwer*, 11 Barb. (N. Y.) 228.

<sup>12</sup> *Hill v. Nautilus Ins. Co.*, 4 Sand. Ch. (N. Y.) 577.

<sup>13</sup> *Sands v. St. Johns*, 36 Barb. (N. Y.) 628.

the company to receive such income, should it be best for the interests of the policy holders. Should such permission be refused, the accrued interest, with the principal, goes to the payment of the policy holders and creditors in the order named.<sup>14</sup>

**§ 342. Kinds of Mutual Insurance Companies.**—Mutual insurance companies may be divided into two general classes: 1. Those which are organized for the purpose of doing an insurance business; 2. Those mutual societies or associations which have a social, benevolent, or like character, but the nature and prevalent purpose of which is that of insurance.<sup>15</sup>

**§ 343. Kinds of Mutual Insurance.**—There are numerous plans or schemes of mutual insurance. Premium notes may be given which are assessable from time to time to the amount stated therein; or the members may be assessed periodically, or as required; or they may be obligated to pay a fixed sum upon a loss; or notes may be given for a part only of the premium, the other part being payable in cash, or the entire premium be paid in advance in cash. Mutual companies are also organized to issue policies upon premium notes, and also for all cash premiums, and the fund thus realized may constitute a common fund for the payment of losses.<sup>16</sup> In the cash premium plan each member has an interest in the surplus premium fund remaining after payment of losses and expenses,<sup>17</sup> for all persons insured on that principle are entitled to look to the premium notes of the members as the capital of the company,<sup>18</sup> and a mutual company may, in New York,<sup>19</sup> issue pol-

<sup>14</sup> *Meles v. Economical Mut. L. Ins. Co.*, 12 R. I. 259. As to what is capital, subject to taxation, see *People v. Supervisors*, 20 Barb. (N. Y.) 81; *Mutual Ins. Co. v. Supervisors*, 4 N. Y. (4 Comst.) 442; *Sun Ins. Co. v. New York*, 8 N. Y. (4 Seld.) 241; 5 Sand. Ch. (N. Y.) 10; *People v. Supervisors*, 16 N. Y. 424.

<sup>15</sup> As far as necessary we have also noticed the shipping clubs and Friendly Societies of England under sec. V, herein.

<sup>16</sup> *Lehigh Valley F. Ins. Co. v. Schimpf*, 13 Phila. (Pa.) 515.

<sup>17</sup> *Spruance ex rel. v. Fire & M. Ins. Co.*, 9 Col. 73, 77, 78, under Col. Gen. Stat., sec. 1704.

<sup>18</sup> *Hays v. Lycoming F. Ins. Co.*, 98 Pa. St. 184; *Hummel's Appeal*, 78 Pa. St. 320; *Lehigh Valley F. Ins. Co. v. Schimpf*, 13 Phila. (Pa.) 515.

<sup>19</sup> As organized under N. Y. Stat. 1849, c. 308.

icies for a fixed cash premium, without liability to contribute by the assured.<sup>20</sup> Nor does such company under the Missouri statute,<sup>21</sup> expose itself to the charge of doing business upon the joint stock plan, by receiving all cash premiums on all policies running less than six years.<sup>22</sup> Nor is a combined premium note, assessment, and cash premium plan ultra vires where the company is chartered to do business on the mutual plan only,<sup>23</sup> though where cash is accepted for premiums the insured is held, in Illinois, not to thereby become a member.<sup>24</sup> But where a New York company was authorized to receive subscriptions payable in cash, and give receipts therefor bearing interest, which receipts showed that the cash was received in advance for premiums only of insurance, but the charter did not provide that those paying such cash should take policies of insurance the premiums on which should equal the cash so paid in, it was held that such plan was not that of mutual insurance under the Illinois laws.<sup>25</sup> It is said by the court in a Colorado case<sup>26</sup> that "the principle of mutuality exists when the persons constituting the company contribute either cash or assessable premium notes, or both, as the plan of transacting business may provide, to a common fund, out of which each is entitled to indemnity in case of loss."<sup>27</sup> Persons so associated are said to be members of the company. They have, or may have, a voice in the management of its affairs, and are practically both insurers and insured. All are interested in what may be termed the profits and losses of the association; for if the assessable note system in any of its forms be adopted, the demands upon

<sup>20</sup> *Mygatt v. New York etc. Ins. Co.*, 21 N. Y. 52.

<sup>21</sup> Act. 1877, Rev. Stat. Mo. 1879, sec. 5988.

<sup>22</sup> *State v. Manufacturers' Mut. F. Ins. Co.*, 91 Mo. 311; 3 S. W. Rep. 383.

<sup>23</sup> *Lehigh Valley F. Ins. Co. v. Schimpf*, 13 Phila. (Pa.) 515; *Davis v. Oskosh Upholstery Co.*, 82 Wis. 488, 771.

<sup>24</sup> *Illinois Mut. F. Ins. Co. v. Stanton*, 57 Ill. 354.

<sup>25</sup> *Mutual F. Ins. Co. v. Swigert*, 120 Ill. 36, 44; 11 N. E. Rep. 410.

<sup>26</sup> *Spruance ex rel. v. Fire & M. Ins. Co.*, 9 Col. 73, 77, 78.

<sup>27</sup> *Clifton Union Ins. Co. v. Hoge*, 21 How. (U. S.) 35; *Mygate v. New York Prot. Co.*, 21 N. Y. 52; *Ohio M. Ins. Co. v. Manetta Wool. Fact.*, 3 Ohio St. 348; *White v. Haight*, 16 N. Y. 310; *May on Insurance*, sec. 548; *Angell on Insurance*, sec. 413.

each member to meet assessments during the life of his policy or risk are large or small, according to the multiplication or diminution of losses; while if a cash premium plan prevail, each member has an interest in the surplus premium fund remaining after payment of losses and expenses, and of course the amount of such surplus is governed by the extent of the losses suffered. The policy holder in the joint stock company is not thus situated. He pays a certain definite sum as a premium, and the company agrees therefor to pay him a certain specific amount in case of loss. He has no voice whatever in the management of the business, and whether the profits or losses are large or small does not concern him, provided the company remains able to liquidate any losses contemplated by his contract. . . . The principle of mutuality has probably been more often recognized and enforced in these associations through the assessable note system in some of its numerous forms, but . . . it is perfectly consistent with the payment of cash premiums.”<sup>28</sup> In case of deposit notes, contributions are obtained from the makers for losses and damages by pro rata assessments of a just proportion upon each member liable thereon, and payments thereof are required upon due notice.<sup>29</sup> Mr. Niblack<sup>30</sup> makes three general divisions of the plans of insurance in mutual benefit societies, as follows: “1. Where the society agrees, upon certain conditions, to pay a certain sum of money on the death of a member; 2. Where the society agrees to pay, on certain conditions, as many dollars as there are members of the society in good standing at the time of the death of a member; 3. Where the society agrees, upon certain conditions, on the death of a member, to levy an assessment upon its members of a certain sum of money, and to pay the proceeds of such assessment to the beneficiary of the member.” This division is at once concise and comprehensive.<sup>31</sup>

<sup>28</sup> As to the government and organization of mutual companies in New York, and the statutes of that state down to and including that of 1849, as well as the relations of members, etc., see opinion of Denio, C. J., in *White v. Haight*, 16 N. Y. 310.

<sup>29</sup> *Planters' Ins. Co. v. Comfort*, 50 Miss. 662, 668.

<sup>30</sup> *Niblack's Mutual Benefit Societies*, sec. 384.

<sup>31</sup> See further 16 Am. & Eng. Ency. of Law, 17-19.

§ 344. **When Mutual Societies are and are not Insurance Companies.**—When a mutual benefit society or association contracts for a consideration to pay a sum of money upon the happening of a certain contingency, and the prevalent purpose and nature of such society or association is that of insurance, the organization is a mutual insurance company. This is true whether the society be a voluntary one or incorporated, and whether it be known as a relief, benevolent, or benefit society or by some similar name. Nor does the manner or mode of the payment of the consideration or of the loss or benefit affect the question, and make the contract the less one of insurance. The test is, what is the real purpose and nature of such society, and if the prevalent purpose is to make contracts, which are in effect contracts of insurance within the meaning of that word, they are insurance companies.<sup>32</sup> Thus it is held in Arkansas that the rights of persons claiming under a contract must be fixed thereby, without regard to the character of the society, where the statute affords no aid in determining whether it be an insurance contract or not.<sup>33</sup> And it is held in Maine that if the prevalent purpose be that of insurance, its benevolent or charitable features do not affect its legal status as an insurance company.<sup>34</sup> This rule is, however, subject to those exceptions which arise in favor of such companies by reason of statutory exemptions in some of the states.<sup>35</sup>

§ 345. **What Societies are not Insurance Companies — cases.**—It is held in Illinois that an association whose policies were payable only to the widow, orphan, heir, or devisee, and whose members might be assessed not to exceed twenty dollars each year, was exempted from the operation of the statute of that state requiring of life insurance companies a guaranty capital.<sup>36</sup> In Connecticut, it is held that although

<sup>32</sup> See cases in secs. 345, 346, herein.

<sup>33</sup> *Block v. Valley Mut. Ins. Assn.*, 52 Ark. 201; 12 S. W. Rep. 477; 20 Am. St. Rep. 166.

<sup>34</sup> *Bolton v. Bolton*, 73 Me. 299.

<sup>35</sup> See secs. 345, 346, herein.

<sup>36</sup> *Commercial L. Assn. v. People*, 90 Ill. 166, under Ill. Rev. Stat. 1874, c. 32, sec. 31, exempting from the operation of Act of March 26, 1869.

a society, organized in another state as a secret and fraternal society, has an insurance plan as one of its corporate purposes, consisting in the participation in a benefit fund by members of local branches, who pay assessments, nevertheless it is not within a statute requiring foreign corporations, organized for the purpose of furnishing insurance on the assessment plan, to obtain authority from the insurance commissioner, in order to do business within the state,<sup>37</sup> but is within the statute excepting from such requirement every "secret and fraternal society."<sup>38</sup> In Kansas, an insurance association organized on the co-operative plan, is exempt from the insurance laws where payments are made to a beneficiary by assessments on living members, but one of the requirements of the company is that each person, before becoming a member, shall make a deposit to form a guaranty fund for the payment of assessments.<sup>39</sup> In Kentucky, it is decided that the statute regulating "stock or mutual" insurance companies does not include associations organized before that act without capital stock or premium notes to indemnify against loss of life, the performance of whose obligations is secured by a pledge of the property of each member to the extent of his own insurance, the entrance fees being intended only as a fund for paying the expenses.<sup>40</sup> In Michigan, a mutual or co-operative association is not a life insurance company, under the statutes of that state, although it has initiation fees and assessments, and pays a weekly amount for accidental disability.<sup>41</sup> And in the same state it is also held that its statute forbids the transaction of insurance business by companies, the policies of which do not distinctly show the amount of life benefits assured, and the premiums in which are not fixed nor contingent on losses.<sup>42</sup> In Missouri, the term

<sup>37</sup> Gen. Stat. Conn., sec. 2892.

<sup>38</sup> Gen. Stat. Conn., sec. 2903; *Fawcett v. Supreme Sitting etc.*, 64 Conn. 170.

<sup>39</sup> *State v. Bankers' etc. Assn.*, 23 Kan. 499, under Laws 1871, p. 248.

<sup>40</sup> *Louisville German Mut. F. Ins. Assn. v. Commonwealth*, 9 Bush (Ky.), 394, under Act of March 12, 1870.

<sup>41</sup> *Rensenhouse v. Seeley*, 72 Mich. 603; 40 N. W. Rep. 706, under How. Stat., sec. 4225, Laws 1877, Act No. 29.

<sup>42</sup> *National L. Ins. Co. v. State Commissioner*, 25 Mich. 321, under Ins. Law 1872, p. 86.



"insurance purposes" does not include associations which aid families of deceased members.<sup>43</sup> In New York, a benevolent association organized under the general act, and which provides for the payment by the members of one dollar each for the benefit of the widow or minor children of a deceased member, is held not to be a life insurance company,<sup>44</sup> and in the same state it is decided that a society is not governed by the general insurance law where it maintains a relief fund for the benefit of members reaching a certain age, or when they shall become permanently disabled by disease or accident, but is controlled by the statute regulating charitable, benevolent, and beneficiary associations or societies.<sup>45</sup> And in Pennsylvania a mutual aid association of another state is not a foreign insurance corporation within its statute, and is exempted under the statute relating to beneficial associations from the control of the insurance commissioner.<sup>46</sup> In Pennsylvania, a benefit society which does business through the lodge system is not an insurance company under the statute of that state.<sup>47</sup> So under the Wisconsin statute, an Odd Fellows' association incorporated under the laws of another state for the purpose of fraternal benevolent insurance upon the assessment plan, and which confines its membership to persons belonging to its allied order, is held exempt from the state insurance laws relating to life insurance companies, and is one of the "charitable and benevolent orders of . . . Odd Fellows," within the meaning of the statute.<sup>48</sup>

<sup>43</sup> *Barbaro v. Occidental Grove*, 4 Mo. App. 429.

<sup>44</sup> *Durlan v. Central Verein etc.*, 7 Daly (N. Y.), 168.

<sup>45</sup> *Supreme Council etc. v. Fairman*, 10 Abb. N. C. (N. Y.) 162; 62 How. Pr. (N. Y.) 386.

<sup>46</sup> *Commonwealth v. National M. A. Assn.*, 94 Pa. St. 481, under Acts of April 4, 1873, and May 1, 1876.

<sup>47</sup> *Donlevy v. Supreme Lodge etc.* (Pa. 1892), 49 Leg. Intell. 145, under Act of May 11, 1881.

<sup>48</sup> *State v. Whitmore*, 75 Wis. 332; 43 N. W. Rep. 1133, under Laws 1883, c. 94; Laws 1879, c. 204. See, also, Cal. Stat. 1891, c. cxvi, p. 126, sec. 14, p. 130. See further as to what are and are not insurance companies, *State v. Federal Invest. Co.*, 48 Minn. 110; 50 N. W. Rep. 1028. *Examine State v. Vigilant Ins. Co.*, 30 Kan. 585; *State Mutual Prot. Assn.*, 26 Ohio St. 19; *State v. Moore*, 38 Ohio St. 7; *Re National Indem. & E. Co.*, 142 Pa. St. 450; 21 Atl. Rep. 879; *Old v. Robson* (L. R. Q. B.), 7 Rail. & Corp. L. J. 511; *Martin v. Stubbings*, 128 Ill. 387; 9 Am. St. Rep. 620; *Northwestern etc. Assn. v. Jones*, 154 Pa.

§ 346. **What Societies are Insurance Companies—Cases.**—In Dakota, where the principal objects and purposes of an association organized under the general incorporation laws of the state is to secure to the beneficiary, or representative of each member on his death, the payment of a certain sum of money in accordance with the conditions and requirements of the charter and by-laws, such association is a life insurance company, and the relations sustained by the members are based upon contract.<sup>49</sup> In Iowa, a fraternal benevolent corporation of a sister state which provides a beneficiary fund for the payment of death benefits is a life insurance organization, and subject to the provisions of the statute requiring a guarantee capital as a prerequisite to transacting business in that state.<sup>50</sup> In another case in the same state it is held that where the prevalent purpose of a secret order is to create a benefit fund for sickness or disability of members, and to pay a certain sum to a designated person on a member's death, such association is an insurance company within the statutory insurance requirements of that state.<sup>51</sup> In Illinois, a society which sets apart a fund raised by voluntary contributions from its members, and which pays therefor a certain amount to designated beneficiaries of deceased members, and other sums to living members, holding numbers just above or just below that of the deceased, is an insurance company, and is not exempt under the statute providing that societies shall not be deemed insurance companies, the purpose of which is to benefit widows, orphans, heirs, and devisees of deceased members and members receiving permanent disabilities.<sup>52</sup> In Indiana, a mutual benevolent society which provides a certain sum for the beneficiary in the event of a member's death, to be paid from a fund raised by assessment on the surviving member's death is in effect a life insurance company.<sup>53</sup> In Kansas where such an association con-

St. 99; 35 Am. St. Rep. 810; *Chartrand v. Brace*, 16 Col. 19; 25 Am. St. Rep. 235; *Block v. Valley M. Ins. Assn.*, 52 Ark. 201; 20 Am. St. Rep. 106.

<sup>49</sup> *Masonic Aid Assn. v. Taylor*, 2 S. Dak. 324; 50 N. W. Rep. 93.

<sup>50</sup> *State v. Miller*, 66 Iowa. 26.

<sup>51</sup> *State ex rel. Graham v. Nichols*, 78 Iowa, 747; 41 N. W. Rep. 4.

<sup>52</sup> *Rule v. People*, 118 Ill. 492; 9 N. E. Rep. 342; 7 West. Rep. 219.

<sup>53</sup> *Elkhart Mut. A. Assn. v. Houghton*, 103 Ind. 286, 287; 53 Am. Rep. 514; 1 West. Rep. 284.

tracts to pay at stated periods certain sums as endowments to living members, or, in case of a member's death, then to pay the benefit to designated beneficiaries, such contracts constitute life insurance, both as to the endowments and the benefits;<sup>54</sup> and in the same state a mutual aid association which does business with its members upon a mutual life insurance plan is subject to the control of the insurance department and to the laws relative to insurance companies.<sup>55</sup> In Kentucky, a mutual life association which has the essential elements of a life insurance company comes within the provisions of the insurance statute.<sup>56</sup> In Maine, in the case of *Bolton v. Bolton*,<sup>57</sup> which was that of a Masonic relief association, the court declares that if the prevalent purpose be that of insurance, such purpose controls, whatever may be the association's name, and that the benevolent or charitable results to the beneficiaries will not change its legal character, and that the association and others of like nature were mutual life insurance companies. In Massachusetts, a contract by which an association, for a consideration, engages to pay money upon the death of a member to one who has an interest in the life, is not the less a contract of insurance, because the amount to be paid is not a gross sum, but is graduated by the number of members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of deaths of such members; nor because it provides no means of enforcing payment of the assessments; and the fact that the general objects of the association are benevolent, not speculative, will make no difference. Such an association is within the operation of a statute imposing restrictions upon insurance companies.<sup>58</sup> In the Michigan case of *Rensenhouse v. Seeley*,<sup>59</sup> it is said that mutual benefit and co-operative associations, whether corporations or mere voluntary associations, are, strictly speaking, insurance organizations.

<sup>54</sup> Endowment etc. Assn. v. State, 35 Kan. 253.

<sup>55</sup> State v. National Assn., 35 Kan. 51; State v. Vigilant Ins. Co., 30 Kan. 585.

<sup>56</sup> *Sherman v. Commonwealth*, 82 Ky. 102.

<sup>57</sup> 73 Me. 299, 303.

<sup>58</sup> *Commonwealth v. Wetherbee*, 105 Mass. 149, 161.

<sup>59</sup> 72 Mich. 603, 617.

whenever, in consideration of periodical contributions, they engage to pay the member or his designated beneficiary a benefit upon the happening of a specified contingency. The Minnesota courts hold that an association for the transaction of the business of life and casualty insurance on the co-operative or assessment plan is, in effect, a mutual benefit society,<sup>60</sup> and that an association which raises a fund by assessment of one dollar each on all the members, for the endowment of the wife of each member, is not a "benevolent society" under the state statute relating to the incorporation of such societies.<sup>61</sup> In Missouri, a society known as the Merchants' Exchange Mutual Benevolent Society had executive officers and a board of trustees. It divided its membership into classes, in each of which the fees paid by members of a certain class were kept separately and exclusively for its benefit. Assessments and the interest on a fund raised by initiation fees were resorted to for making payments and furnishing aid to the widows, children, etc., of deceased members. It was determined that the society was a mutual insurance company, subject to the insurance laws of that state.<sup>62</sup> In another case in that state it is held that a contract of insurance existed where there was a promise, based upon a consideration, to pay upon a loss, and where the principal object and purpose of the association was to insure the members under such contracts. In this organization there were salaried officers, and anyone was entitled to membership upon compliance with the required conditions as to age and health. Commissions were also paid by the society to its members on risks obtained for it. It was also decided that the contract could be made none the less one of insurance by the organization calling itself a benevolent society, and obtaining a charter as such, and though the amount payable was not a gross sum, but graduated by the number of persons in a given class at the time of the death of the insured, and though there was no means of compelling the payment of an

<sup>60</sup> *Hesinger v. Home B. Assn.*, 41 Minn. 516; 43 N. W. Rep. 481.

<sup>61</sup> *State v. Critchett*, 37 Minn. 13; 32 N. W. Rep. 787. See *State v. Truberg*, 37 Minn. 97; 33 N. W. Rep. 554.

<sup>62</sup> *State v. Merchants' Exch. etc. Soc.*, 72 Mo. 146, 159.

assessment made upon a member's death, and though the insurer was not liable for the amount actually collected from members upon the happening of the loss, the agreement would nevertheless be an actual contract of insurance under the above facts.<sup>63</sup> In New Hampshire, a mutual relief association which makes an assessment on surviving members of one dollar each for the payment of a benefit to an appointee of the deceased or a member of his family is a life insurance company.<sup>64</sup> In Nebraska, an association for insuring the livestock of members is an insurance company, and subject to the requirements of the insurance statutes. In this case the membership was unlimited, though certificates of membership were issued and the premium was paid as an admission fee and by assessments.<sup>65</sup> In Pennsylvania, it is said that a beneficial association for mutual assistance in sickness or inability to labor is virtually a mutual health insurance company.<sup>66</sup> In Texas, a corporation was held to be an insurance company, subject to the provisions of the insurance laws, where it had salaried officers and agents, required an examination by a physician of intending insurers, and which, in consideration of a membership fee and assessments, agreed to provide for members during life and the payment of a certain sum to a member's family upon his decease.<sup>67</sup> In Virginia, only such assessment companies are entitled to be licensed, without making the deposit of bonds required under the statute, as make an assessment upon surviving members in order to pay losses.<sup>68</sup> In Wisconsin, a benevolent mutual aid society was held subject to the same legal principles in determining its liability for a loss as apply to mutual life insurance companies.<sup>69</sup> In the United States circuit court it is held that a

<sup>63</sup> *State v. Citizens' B. Assn.*, 6 Mo. App. 163, under Mo. Acts 1874, p. 81, secs. 3, 5.

<sup>64</sup> *Smith v. Bullard*, 61 N. H. 381, under N. H. Gen. Laws, c. 175.

<sup>65</sup> *State v. Northwestern Mut. L. S. Assn.*, 16 Neb. 549.

<sup>66</sup> *Franklin v. Commonwealth*, 10 Pa. St. 357, 359.

<sup>67</sup> *Farmer v. State*, 69 Tex. 561; 7 S. W. Rep. 220, under Rev. Stat. Tex., title 20.

<sup>68</sup> *Mutual B. L. Co. v. Mayre*, 85 Va. 643; 8 S. E. Rep. 481, under Va. Act, May 18, 1887.

<sup>69</sup> *Erdmann v. Mutual Ins. Co.*, 44 Wis. 376, 379.

Masonic life indemnity company whose business is on the assessment plan, but which has no fraternal, social, or like purposes, is an insurance company.<sup>70</sup>

<sup>70</sup> *Knights Templar etc. Co. v. Berry*, 50 Fed. Rep. 511. See further on this subject, *State ex rel. Clapp v. Federal Invest. Co.*, 48 Minn. 110; 50 N. W. Rep. 1028; *State v. Standard L. Assn.*, 38 Ohio St. 281; *Supreme Commandary v. Ainsworth*, 71 Ala. 436; 46 Am. Rep. 332; *Ronald v. Mutual etc. Assn.*, 44 N. Y. 407; 30 N. E. Rep. 739; 21 Ins. L. J. 634; *Swift v. San Francisco Board etc.*, 67 Cal. 567; *Goodman v. Jedijah Lodge*, 67 Md. 117; 8 Cent. Rep. 278; 9 Atl. Rep. 13.

## CHAPTER XVI.

### PARTIES—MUTUAL COMPANIES, CONTINUED.

- § 350. Powers of mutual companies affecting the contract—Ultra vires.
- § 351. Same subject: Guarantee fund.
- § 352. Benevolent and fraternal organizations subject to laws of state and jurisdiction of courts.
- § 353. Absolute right to become members under charter of mutual company.
- § 354. Contribution by subordinate lodge to supreme lodge: Specific purpose: Power of disposal of funds.
- § 355. Effect of decision by official body created by constitution of order.
- § 356. Delegation of power by supreme lodge of mutual benefit society.
- § 357. Subordinate association cannot be deprived of charter without hearing.
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#### *SUBDIV. I. Mutual Companies: By-Laws.*

- § 364. Definition of by-laws.
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- § 378. By-laws: Changes, how made.
- § 379. By-laws: Statutory or charter power to repeal, change, etc.
- § 380. Change of by-laws: Vested rights.
- § 381. Construction of by-laws.

§ 350. **Power of Mutual Companies Affecting the Contract—Ultra Vires.**—In mutual companies or societies, whether they be incorporated or voluntary organizations, the charter or articles of association must be looked to as the measure of their powers, as these constitute their fundamental and organic law, the compact governing their acts subject to the constitution and laws of the state.<sup>1</sup> A charter of a mutual insurance company may provide that the corporation can divide applications for insurance into two or more classes, according to the degree of hazard, and that the premium notes shall not in such case be assessed for any losses, except in the class to which they belong, where such provision does not conflict with the terms of the act under which it was formed.<sup>2</sup> It is held that a mutual benefit society may change its plan of insurance, and such change does not violate its prior contracts;<sup>3</sup> and where the general purpose of such society is the welfare of its members and their relief in times of sickness and distress, it may extend its benefits to the families of members and provide for widows of deceased members,<sup>4</sup> but a mutual company cannot by mere force of a by-law change from a corporation having no capital stock to one which has,<sup>5</sup> and mutual insurance companies on the assessment plan have no authority to provide for the payment of an agreed annual deposit during the life of a policy, by which the holder shall be exempt from assessment for losses during the year of the prepayment, as such annual deposit is in fact a premium for carrying the risk, and not a specific assessment authorized by the statute;<sup>6</sup> nor can a mutual fire insur-

<sup>1</sup> *Chamberlain v. Lincoln*, 129 Mass. 70; *Bergman v. St. Paul Mut. B. Soc.*, 29 Minn. 275; *Austin v. Searing*, 16 N. Y. 112; 69 Am. Dec. 69; 1 *Morawetz on Corporations*, ed. 1882, c. vii, 2d ed., c. xv; *Golden Rule v. People*, 118 Ill. 492; *State ex rel. Bankers' etc. Assn.*, 23 Kan. 499; *Grosvenor v. United Society*, 118 Mass. 78; *State ex rel. v. Monitor etc. Assn.*, 42 Ohio St. 555; *Commonwealth v. St. Patrick's Soc.*, 2 Binn. (Pa.) 441; 4 Am. Dec. 453. See secs. 31, 46, 99, 274, herein.

<sup>2</sup> *White v. Coventry*, 29 Barb. (N. Y.) 305.

<sup>3</sup> *Supreme Lodge v. Knight*, 117 Ind. 489; 20 N. E. Rep. 479.

<sup>4</sup> *Gundlach v. Germania Mechanics' Assn.*, 4 Hun (N. Y.), 339; 49 How. Pr. 190.

<sup>5</sup> *State v. Utter*, 33 N. J. L. (4 Vroom) 183.

<sup>6</sup> *State v. Monitor F. Assn.*, 42 Ohio St. 555.



ance company, organized under the general laws of Wisconsin, effect insurances on property other than that mentioned therein.<sup>7</sup> And an association organized "for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of deceased members," has no authority to issue a certificate of membership payable to the beneficiary "or assigns," or, in the event of his death, payable to any other than his family or heirs.<sup>8</sup> But such company incorporated in New York, and having a general power to insure under its charter, may issue policies on personal property in Canada owned by parties there.<sup>9</sup> A mutual insurance company may borrow money to pay its losses, and may give its note for such borrowed money, and a member of the company is liable to an assessment to pay a judgment on the note.<sup>10</sup> Such company, or its receiver, also has power to allow equitable claims for losses, though no actions to recover the same could be maintained by reason of the neglect of the claimants to bring them within the time prescribed by the charter or by-laws of the company, or that limited by statute; and actions upon premium notes to collect money to pay such claims cannot be defeated on the ground that payment of them might have been avoided.<sup>11</sup> But it cannot in a single instance deal with one of its members on a basis different from that on which all others are dealt with;<sup>12</sup> nor can such company appropriate assessments made to pay losses, nor the annual deposits received in view of assessments to the purchase of the assets of another like corporation, including unnecessary real estate, nor may it devote such funds to the payment of losses of the members of such other corporations, as such act constitutes a misapplication of trust funds.<sup>13</sup> Members of a mutual fire and marine insur-

<sup>7</sup> *O'Neil v. Pleasant Prairie Mut. F. Ins. Co.*, 71 Wis. 621; 38 N. W. Rep. 345.

<sup>8</sup> *State v. People's Mut. B. Assn.*, 42 Ohio St. 579 (organized under Ohio Rev. Stat., sec. 3830).

<sup>9</sup> *Western v. Genesee Mut. Ins. Co.*, 12 N. Y. 258.

<sup>10</sup> *Orr v. Mercer Co. Mut. F. Ins. Co.*, 114 Pa. St. 387.

<sup>11</sup> *Sands v. Hill*, 42 Barb. (N. Y.) 651.

<sup>12</sup> *Clevenger v. Mut. L. Ins. Co.*, 2 Dak. 114.

<sup>13</sup> *State v. Monitor F. Assn.*, 42 Ohio St. 555.

ance company are estopped to dispute the power of such corporation to carry on two separate departments, without recourse by either to the assets of the other, where such act has been fully advertised for more than twenty years, and members have had full knowledge of the arrangement.<sup>14</sup> Such corporations have the right to manage their own affairs and to control their members,<sup>15</sup> and an insurance association is bound by the act of the majority in the absence of restrictions in the articles of association.<sup>16</sup> Mutual benefit societies are estopped from defending on the ground of ultra vires against one of its contracts where it has received assessments thereon.<sup>17</sup> And by accepting and retaining the dues and fees of a member, with knowledge of the facts, a mutual benefit association waives all irregularity in the organization of a subordinate lodge.<sup>18</sup> And where the certificate of incorporation of a mutual benefit company declares its particular purpose to be that of giving "financial aid and benefit to the widows, heirs, or devisees of deceased members," certificates which undertake to pay a sum of money to members on arriving at a certain age are ultra vires and void;<sup>19</sup> and a corporation authorized by its charter to insure against fire, whether caused "by accident, lightning, or any other means," cannot insure against damage by lightning not resulting in fire, although their by-laws provide for their doing so.<sup>20</sup> And where the charter of an insurance company permits it to receive notes for premiums in advance, subject to be used by the company in payment of losses, etc., and requires the notes, so given, to be made payable within twelve months from date," the notes must be drawn in accordance therewith, and used for the purposes mentioned therein.<sup>21</sup>

<sup>14</sup> *Doane v. Millville Mut. M. & F. Ins. Co.*, 43 N. J. Eq. 522: 11 Atl. Rep. 739. See, also, *Citizens' etc. Co. v. Sortwell*, 8 Allen (Mass.), 217.

<sup>15</sup> *Anacosta Tribe v. Murbach*, 13 Md. 911; 71 Am. Dec. 625.

<sup>16</sup> *Korn v. Mutual Assur. Soc. of Va.*, 6 Cranch (U. S.), 192; *Dean v. Tucker*, 2 Cranch (C. C.), 26.

<sup>17</sup> *Matt v. Roman Catholic etc. Soc.*, 70 Iowa, 455; 30 N. W. Rep. 799.

<sup>18</sup> *Perine v. Grand Lodge of A. O. U. W.*, 48 Minn. 82; 50 N. W. Rep. 1022; 21 Ins. L. J. 213.

<sup>19</sup> *Rockhold v. Canton Mas. Mut. B. Soc.*, 129 Ill. 440; 21 N. E. Rep. 794.

<sup>20</sup> *Andrews v. Mutual Ins. Co.*, 37 Me. 256.

<sup>21</sup> *Osgood v. Toplitz*, 3 Lans. (N. Y.) 184.

§ 351. **Same Subject—Guaranty Fund.**—It is held in Wisconsin that in the absence of a charter provision therefor, or of a general power to raise a fund for losses and expenses, the act of a mutual company in contracting with its members for establishing a guaranty fund for its existing and future indebtedness is ultra vires and void.<sup>22</sup> In a New Jersey case a mutual insurance company without authority by charter, established a guaranty fund of bonds secured by mortgages. It was held that as the company had no power to make the contract with the guarantors, it was absolutely void, and that the fund could not be reached in law or equity by a creditor of the company after its insolvency.<sup>23</sup> But it is held in other states that an insurance company has inherent power in the absence of positive restrictions to establish a guaranty fund,<sup>24</sup> and to receive a promissory note from one of its trustees as a part of such fund. Such note is a valid security in the hands of a receiver, for the benefit of the company's creditors. The act of the company in undertaking business in another state, under an act of the legislature thereof requiring other and special security, does not exonerate the signer of such a guaranty from liability thereon, at least in respect to policies not issued in such state. The inducement held out to the public to insure by reason of the security afforded by the guaranty is a sufficient consideration, or furnishes the ground for an estoppel.<sup>25</sup>

§ 352. **Benevolent and Fraternal Organizations Subject to Laws of State and Jurisdiction of Courts.**—It may be stated generally that all benevolent and fraternal organizations or associations are subject to the laws of the state, and in all proper cases, where property rights are involved, the courts may entertain jurisdiction and afford relief.<sup>26</sup>

<sup>22</sup> Kennan v. Rimble, 81 Wis. 212; 51 N. W. Rep. 426.

<sup>23</sup> Trenton Ins. Co. v. McKelway, 12 N. J. Eq. (1 Beas.) 133.

<sup>24</sup> Hope Mut. Ins. Co. v. Perkins, 2 Abb. App. Dec. 383; 33 N. Y. 404; Hope Mut. Ins. Co. v. Weed, 28 Conn. 50.

<sup>25</sup> Hope Mut. Ins. Co. v. Perkins, 2 Abb. App. Dec. 383; 33 N. Y. 404; Russell v. Bristol, 49 Conn. 251.

<sup>26</sup> Reno Lodge etc. v. Grand Lodge etc., 54 Kan. 73, 80; 37 Pac. Rep. 1003, per Allen, J.; citing Bauer v. Samson Lodge, 102 Ind. 262; 1 N. E. Rep. 571; Genest v. L'Union St. Joseph, 141 Mass. 417; Torrey

But they will take into consideration the objects and purposes of the organization in granting relief. They will further consider the modes provided by the charter, constitution, and by-laws for determining the rights of members. Courts, however, ordinarily leave all questions involving policy or discipline to be settled in the manner pointed out by the regulations of the order. These organizations are formed by a purely voluntary association of individuals for the accomplishment of agreed-upon purposes. The selection of the purposes intended and the determination of the means of accomplishment of those purposes are peculiarly matters within the decision of the association alone. Thus, the grand lodge of the state of Kansas of a certain order had for one of its fundamental objects the care of orphans of deceased members. In order to make use of certain property conveyed to it in trust, it levied an assessment of so much per capita on all the subordinate lodges in Kansas, to pay off an indebtedness and make certain improvements for the benefit of a home for the maintenance and education of orphans of deceased members of the order. The right to do this was not in violation of any law of the state. An appeal existed from the grand lodge to the sovereign grand lodge, either with or without the consent of the grand lodge, and such sovereign grand lodge was conceded to have full legislative and judicial power in determining matters relating to the order. No appeal was taken to the latter lodge, and an injunction was sought to prevent the levy of the assessment, which was refused, it being held that the question of methods and amount to be raised was a matter of policy for the association to determine, and that courts will not undertake to direct or control the internal policy of such societies.<sup>27</sup> But

*v. Baker*, 1 Allen (Mass.), 120; *Austin v. Searing*, 16 N. Y. 112; 69 Am. Dec. 665, and note; *Dolan v. Court Good Samaritan*, 128 Mass. 437; *Goodman v. Jedidjah Lodge*, 67 Md. 117.

<sup>27</sup> *Reno Lodge etc. v. Grand Lodge etc.*, 54 Kan. 73; 37 Pac. Rep. 1003, per Allen, J.; citing *Niblack's Mutual Benefit Societies*, secs. 79, 130; *Bacon's Benefit Societies*, sec. 94; *Harrington v. Benevolent Assn.*, 70 Ga. 340; *Chamberlain v. Lincoln*, 129 Mass. 70; *Lafond v. Deemes*, 81 N. Y. 507; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Oliver v. Hopkins*, 144 Mass. 175; 10 N. E. Rep. 776.

an arbitrary exercise by the ruler, of the power of removal of officers is not justified when made without notice or an opportunity to appear and be heard.<sup>28</sup> So it is held in Connecticut that remedies within the order must first be exhausted where property rights are not involved, and that this rule is universally accepted.<sup>29</sup>

**§ 353. Absolute Right to Become Member Under Charter of Mutual Company.**—If the charter of a mutual insurance company makes it the absolute right of a certain class of persons in a certain locality to become members, the conditions being subscribing the articles and applying for insurance on the terms and requirements of the charter and by-laws, upon compliance with the conditions such right may be insisted on, and cannot be cut off by an officer of the corporation, for he has no option on the subject.<sup>30</sup>

**§ 354. Contributions by Subordinate Lodge to Supreme Lodge—Specific Purpose—Power of Disposal of Funds.**—If the supreme lodge of a benevolent society receives, in response to a "distress call," funds by way of contributions from subordinate lodges, it has no power to withhold any part of such fund from the persons for whom intended, even though the approximation of the persons injured and intended to be benefited is of a greater number than actually injured.<sup>31</sup> In this case the court, per Bennett, C. J., said: "We agree that when contributions are made to the common fund of a society, or as a special fund, to be used in whole or in

<sup>28</sup> *Caine v. Benevolent Order of Elks*, 34 N. Y. Supp. 528; 88 Hun (N. Y.), 154.

<sup>29</sup> *Mead v. Stirling*, 62 Conn. 586; 27 Atl. Rep. 591; citing and considering *Oliver v. Hopkins*, 144 Mass. 175; *Chamberlain v. Lincoln*, 129 Mass. 70; *McAlees v. The Iron Hall* (Pa. 1888), 12 Cent. Rep. 415; *Hawes v. Oakland*, 104 U. S. 450; *Schmidt v. Abraham Lincoln Lodge*, 84 Ky. 490; *Hall v. Knights of Honor*, 24 Fed. Rep. 450. See *Grand Grove A. O. of D. v. Duchein*, 105 Cal. 226, 33 Pac. Rep. 947, per Harrison, J., that acts under jurisdiction by rules of the order properly conferred are not subject to review.

<sup>30</sup> *Gay v. Farmers' Mut. Ins. Co.*, 51 Mich. 245.

<sup>31</sup> *Supreme Lodge K. & L. of H. v. Owens etc.*, 94 Ky. 327; 22 S. W. Rep. 327.

part by it, at its discretion, for the benefit of such members as it might select, or in such proportion as it might agree, a court of equity cannot control its judgment either as to the amount or as to the proportion of the donation among the members. But, as said, the contributors raised a fund and placed it in the hands of appellant, as trustee, for a specific purpose, and the trustee was not given the power to pay the money or withhold it, or a part of it, at its discretion, but the only discretion given it was the power to distribute it according to the necessities of the donees. It was the trustee of an express trust for that purpose alone, and had no power to withhold any part of the fund from distribution, because it was not delegated to it. The whole was contributed for their benefit, and they, as far as the appellant is concerned, are entitled to it."

**§ 355. Effect of Decision by Official Body Created by Constitution of Order.**—Where the endowment rank of an order is separate from the lodge, and is for insurance purposes only, and the constitution creates a board of control having entire control over the endowment rank, subject to certain restrictions by the supreme lodge, with authority to hear and determine all appeals, a record made by said board in pursuance of this authority and consequent upon certain other acts which it was authorized to do, operates as an authoritative construction of its regulations; the courts will follow its ruling, and it is not a decision *res inter alios acta*.<sup>32</sup>

**§ 356. Delegation of Power by Supreme Lodge—Mutual Benefit Society.**—Although the supreme lodge of a mutual benefit society may have the fullest power under its charter to pass all such reasonable laws as it may deem proper for the establishment and government of an endowment rank, and to enact general laws, yet where its charter vests that power alone in the supreme lodge, it cannot abdicate its authority and delegate the power to a board of control or other agency.<sup>33</sup>

<sup>32</sup> *Supreme Lodge K. of P. of the W. v. Kalinski*, 6 U. S. C. C. 373; 57 Fed. Rep. 348; 13 U. S. App. 574; 23 Ins. L. J. 44.

<sup>33</sup> *Supreme Lodge K. of P. v. La Malta*, 95 Tenn. 158; 31 S. W. Rep. 493.

§ 357. **Subordinate Association Cannot be Deprived of Charter without Hearing.**—If a corporation passes a by-law which authorizes a subordinate association to be deprived of its charter without a hearing, such by-law is unreasonable and void. The opinion of the court in this case is important and we quote therefrom as follows: "The plaintiff is the supreme tribunal of Druidism in California, and the defendant, Garibaldi Grove, No. 71, is a subordinate grove of Druids, of which the appellant, Duchein, is the treasurer. The relation between the plaintiff and the subordinate grove is established by the constitution and by-laws of the order, by virtue of which the grand grove is given 'sole right and full power to grant charters to subordinate groves, to receive appeals and redress grievances, and, in its discretion, for good cause shown, to suspend groves, arrest charters,' etc. By section 15 it is provided that when any subordinate grove shall violate the terms of its charter, or refuse or neglect to obey the direction and laws of the grand grove, or the general laws of the order, charges thereof may be preferred in writing to the grand grove, and a copy thereof shall be furnished to the grove complained of, and notice when and where to appear for trial. The grand grove holds an annual session on the third Tuesday of June in each year, and it is provided in section 9 of article 20 that 'during the recess of the grand grove the noble grand arch may, whenever he shall deem it necessary, suspend a delinquent or offending grove, such suspension to hold good until annulled by the grand grove.' On the 5th of September, 1892, the noble grand arch of the plaintiff suspended Garibaldi Grove, No. 71, for the reason that he considered it was an 'offending grove,' and issued a proclamation of this fact to the other subordinate groves within the state. Article 19 of the rules of the order provides that the trustees shall be the custodians of the property of the grand grove, and that 'it shall be their duty to execute all orders of the noble grand arch, to receive, by legal process or otherwise, all moneys, papers, and other property of dissolved or suspended groves in this jurisdiction,' etc. In December, 1892, the noble grand arch reported this suspension

to the trustees of the plaintiff, and directed them to commence the present action for the possession of the books and records of the suspended grove, and for the moneys belonging to it. The court found that the appellant, Duchein, as treasurer of Garibaldi Grove, had in his possession nine hundred and fifty-four dollars and fifteen cents, moneys belonging to said grove, which he refused to deliver upon the demand of the trustees therefor, and rendered judgment directing him to pay the said money to the plaintiff herein or to its trustees. From this judgment and an order denying a new trial Duchein has appealed." As to the law the court says: "It is a principle of natural justice that no one shall be condemned without an opportunity to be heard in his defense. Whoever would claim the right to deprive another of property or privilege, without giving him an opportunity to defend the same, must show some consent on his part to such action . . . ; there is no distinction in principle between expelling a member from, a subordinate grove and revoking the charter of the grove itself or suspending its charter. . . . We are of the opinion, however, that the rules of the plaintiff do not authorize an arbitrary suspension of the grove by him (the noble grand arch), but that whenever he proposes to take such action the grove which is charged with an offense for which he is authorized to suspend it has the right to be informed of such charge, and to be heard in its defense before he can act. . . . The limitation upon the power of the grand grove to itself suspend a subordinate grove 'for good cause shown' implies that formal charges must be presented and sustained, and the provision in section 15, that when charges are made against a subordinate grove a copy of the charges shall be furnished to it, and an opportunity given to be heard, show that the general principles under which a suspension may be had require such notice and hearing. The power of suspension which is conferred upon the noble grand arch is to be exercised by him only during the recess of the grand grove, and, in the absence of express terms, ought not to be construed as greater than that of the grand grove itself, or to be exercised in any other mode than that provided for the grand grove. The authority given



to this officer is not limited to a suspension until the next session of the grand grove, but holds good 'until annulled' by the grand grove. This provision indicates that it is to have the same effect as if the suspension had been made by the grand grove, since unless some action in the nature of an appeal is taken from the act of the noble grand arch, the grand grove is never required to exercise its will upon the subject. . . . We hold, therefore, that the action of the noble grand arch in suspending Garibaldi Grove, No. 71, was not in accordance with the rules of the order."<sup>34</sup>

**§ 358. Member of Benevolent Association Cannot be Expelled without Hearing.**—It is well settled that a member of a benevolent association cannot be expelled without being given a hearing, and that a by-law which authorizes such a course is unreasonable and void.<sup>35</sup>

*SUBDIV. I. Mutual Companies: By-Laws.*

**§ 364. Definition of By-laws.**—By-laws are the rules and regulations for the government and conduct of the affairs of the society, association, or corporation enacted within the limits and by virtue of the power conferred by the charter or articles of association.<sup>36</sup>

**§ 365. Power to Enact By-laws Inherent.**—The power to enact by-laws is inherent in every private corporation or

<sup>34</sup> *Grand Grove A. O. of D. v. Duchein*, 105 Cal. 219; 38 Pac. Rep. 947, per Harrison, J. See *Order of Iron Hall v. Moore*, 47 Ill. App. 251. As to power of subordinate lodge of benevolent society to appropriate funds for support of lodge under the same jurisdiction, see *Lady Lincoln Lodge v. Faist* (Ct. C. N. J. 1894), 28 Atl. Rep. 555.

<sup>35</sup> *Grand Grove A. O. of D. v. Duchein*, 105 Cal. 219, 225; 38 Pac. Rep. 947, per Harrison, J., citing *Fritz v. Muck*, 62 How. Pr. (N. Y.) 69; *Wachtel v. Noah Widows' etc. Soc.*, 84 N. Y. 28; 38 Am. Rep. 478; *People v. Musical etc. Union*, 118 N. Y. 108; *Bacon's Benefit Societies*, sec. 101.

<sup>36</sup> See 1 Morawetz on *Private Corporations*, 2d ed., sec. 491, et seq.; ed. 1882, sec. 366.

association,<sup>37</sup> for it cannot be otherwise than reasonable that the power to prescribe rules and regulations as to the manner in which the corporate powers shall be exercised should reside in the corporation or association, subject to such limitations as exist in the charter or articles of association and the constitution and laws of the state.<sup>38</sup> Such power is generally exercised by the majority in the absence of a provision in the charter or articles of association, or some general statute to which the charter is subject, providing otherwise.<sup>39</sup>

**§ 366. Charter Provisions Concerning By-laws.**—Where the charter prescribes the mode of enactment of by-laws, that mode must be followed.<sup>40</sup> If the president and directors are empowered to make by-laws, the power may be exercised by the president and a majority of the directors;<sup>41</sup> but where neither the statute nor charter gives the exclusive right to the directors to make by-laws, they may be duly passed by the members at a proper meeting.<sup>42</sup>

**§ 367. Adoption of By-laws by Custom or Usage.**—Where an association or corporation, or its officers and agents, have invariably and uniformly, for a sufficient length of time pursued a certain course of procedure in a matter which could properly have been regulated by a valid by-law, such custom and usage of the society is evidence of the adoption of a by-law, and while it might not strictly be construed into a by-law, yet it may have the force and effect of one

<sup>37</sup> Supreme Lodge K. of P. v. Knight, 117 Ind. 489; 1 Blackstone's Commentaries, 496; "By-laws," 3 Salk. 76; Morawetz on Private Corporations, ed. 1882, sec. 366; 1 Id., 2d ed., sec. 491; Angell & Ames on Corporations, 9th ed., sec. 345.

<sup>38</sup> See Commonwealth v. St. Patrick's Soc., 2 Binn. (Pa.) 441; 4 Am. Dec. 453.

<sup>39</sup> See Morawetz on Corporations, ed. 1882, sec. 366; 1 Id., 2d ed., sec. 491; Angell & Ames on Corporations, 9th ed., sec. 327.

<sup>40</sup> Dunston v. Imperial Gas Co., 3 Barn. & Adol. 125.

<sup>41</sup> Cahill v. Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124; 43 Am. Dec. 457.

<sup>42</sup> Borgards v. Farmer's Mut. Ins. Co., 79 Mich. 440; 44 N. W. Rep. 856.

in determining the rights of members or the obligations of the organization,<sup>43</sup> although a by-law will not be assumed to exist from a custom to pursue a particular course in regard to suspensions.<sup>44</sup> But the adoption of a code of by-laws in the regular manner excludes any presumption as to the existence or adoption of by-laws from custom or usage;<sup>45</sup> and in case the by-law provides for the specific manner of payment of assessments, payment in accordance with this requirement is sufficient even though there be a custom contrary thereto, inasmuch as the company cannot avail itself of a custom, as against a by-law, to declare a forfeiture.

**§ 368. Incorporated Societies—Unreasonable By-laws.**

In incorporated societies by-laws will not be upheld which are oppressive, vexatious, unequal, or arbitrary, and contrary to the provisions of its charter, for by-laws in such societies must be reasonable, and the power to enact them be exercised with discretion, and not in a manner manifestly detrimental to corporate interest,<sup>46</sup> for by-laws which are unreasonable are void.<sup>47</sup> In determining the reasonableness of a by-law, the objects and purposes of the society must be considered, as this constitutes an important factor, for what might be reasonably necessary to

<sup>43</sup> See *State v. Curtis*, 9 Nev. 335; *Heney v. Jackson*, 37 Vt. 431, 432; *Masonic Mut. L. Ins. Co. v. Whitman*, 52 Ga. 419; *Union Bank of Md. v. Ridgely*, 1 Har. & G. (Md.) 413; *District Grand Lodge v. Cohn*, 20 Ill. App. 344; *American Ins. Co. v. Oakley*, 9 Paige Ch. (N. Y.) 496; 38 Am. Dec. 561; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 344; *Angell & Ames on Corporations*, 9th ed., secs. 328, 329; *Morawetz on Private Corporations*, sec. 369.

<sup>44</sup> *District Grand Lodge v. Cohn*, 20 Bradw. (Ill.) 335.

<sup>45</sup> *District Grand Lodge etc. v. Cohn*, 20 Ill. App. 335.

<sup>46</sup> *People v. Father Matthew etc. Soc.*, 41 Mich. 67; *Angell & Ames on Corporations*, sec. 347; *Cartan v. Father Matthew etc. Soc.*, 3 Daly (N. Y.), 20. But see *Coleman v. Knights of Honor*, 18 Mo. App. 189. "By-laws must be reasonable, and all which are nugatory and vexatious, unequal, oppressive, or manifestly detrimental to the interests of the corporation, are void": *Angell & Ames on Corporations*, 9th ed., sec. 347; *Morawetz on Private Corporations*, sec. 368.

<sup>47</sup> *Schmidt v. Abraham Lincoln Lodge*, 84 Ky. 490; 2 S. W. Rep. 156; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Allmatt v. High Court of Foresters (Mich.)*, 28 N. W. Rep. 802; *Mulroy v. Supreme Lodge K. of H.*, 28 Mo. App. 463; *People v. Father Matthew etc.*, 41 Mich. 67.

effectuate the corporate purposes of one society and promote its welfare, might be unreasonable as outside the general purposes of another organization, and detrimental to its interest.<sup>48</sup> A by-law which provides for forfeitures, without due notice and opportunity for a hearing, is void;<sup>49</sup> but a by-law is reasonable which requires an initiation of the member in addition to a proposition fee and being elected, notwithstanding that the initiation ceremony is secret.<sup>50</sup> So a by-law is reasonable which provides for forfeiture where death is caused by intemperance,<sup>51</sup> and the same is true of a by-law which provides that members of a railroad relief association shall release the railroad from damages before claiming relief from the society.<sup>52</sup> So a by-law is reasonable which provides for the investigation by a committee of the condition of a member who applies for such benefits.<sup>53</sup> So is a by-law reasonable which limits relief in a benefit society from the time of the application therefor.<sup>54</sup>

**§ 369. Unincorporated Societies—Unreasonable By-laws.**—The rule that by-laws must be reasonable does not apply to unincorporated societies or voluntary associations. The question of their reasonableness will not be inquired into by the courts, nor will the court declare invalid a by-law of a voluntary association, agreed upon by its members, even though in the opinion of the court, it is unreasonable;<sup>55</sup> and a member is bound by all by-laws which are legal, so long as he remains in the society. The act is considered as voluntary on his part, and the terms of the contract his own to the extent,

<sup>48</sup> *Commonwealth v. St. Patrick's B. Soc.*, 2 Binn. (Pa.) 441, 449; 4 Am. Dec. 453; *Dickinson v. Chamber of Commerce*, 29 Wis. 49.

<sup>49</sup> *In re Butchers' B. Assn.*, 38 Pa. St. 298; *Roehler v. Mechanics' Aid Soc.*, 22 Mich. 89; *Queen v. Saddlers' Co.*, 10 H. of L. Cas. 404.

<sup>50</sup> *Matkin v. Supreme Lodge K. of H.*, 82 Tex. 301; 18 S. W. Rep. 306.

<sup>51</sup> *St. Mary's B. Soc. v. Bonford*, 70 Pa. St. 321; *Harrington v. Benevolent Soc.*, 70 Ga. 340.

<sup>52</sup> *State v. Baltimore etc. Co.*, 36 Fed. Rep. 655. See, also, *Fuller v. Baltimore etc. Employees' Relief Assn.*, 67 Md. 493; 10 Atl. Rep. 237.

<sup>53</sup> *Van Poucke v. Netherland etc. Soc.*, 63 Mich. 378; 29 N. W. Rep. 863. See *Lucas v. Thompson*, 146 Pa. St. 315; 23 Atl. Rep. 321; *Harrington v. Benevolent Soc.*, 70 Ga. 340.

<sup>54</sup> 3 Watts & S. (Pa.) 218.

<sup>55</sup> *Kehlinbeck v. Logemann*, 10 Daly (N. Y.), 447.  
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at least, that he may withdraw at any time and determine his relations with the society.<sup>56</sup>

§ 370. **By-laws must not be Unequal.**—A by-law must apply equally and be capable of like operation as to all members. By-laws which discriminate against, or in favor of, certain members, to the exclusion of others, are invalid.<sup>57</sup>

§ 371. **Validity of By-laws.**—A by-law is not invalid which is fairly within the scope of the general purposes of the organization, and it has been held that in determining what are the purposes of an association the courts will liberally construe its articles, especially if the provisions are meritorious;<sup>58</sup> nor can by-laws be validly enacted which are retroactive and *ex post facto*.<sup>59</sup> A mutual insurance company, unless prevented by the terms of its charter, may enact a by-law that if an assessment on a premium note is not paid within thirty days after demand, the policy for which said note is given shall be void until the assessment is paid.<sup>60</sup> A by-law which consists of several distinct and independent parts may be valid as to one part, though void as to the others;<sup>61</sup> but it is otherwise where the by-law constitutes an entirety, each part of which depends upon the other parts, for it is void as to the whole if void in a material part.<sup>62</sup> A by-law is void which provides that the members of an insurance company shall bring a suit in a certain county where their claims are disallowed by the directors.<sup>63</sup>

<sup>56</sup> *Grosvenor v. United etc.*, 118 Mass. 78; *Kehlinbeck v. Logeman*, 10 Daly (N. Y.), 447.

<sup>57</sup> *People v. Father Matthew etc. Soc.*, 41 Mich. 67; *Taylor v. Griswold*, 14 N. J. L. 223. See *Clevenger v. Mutual L. etc.*, 2 Dak. 114.

<sup>58</sup> *Gundlack v. Germania Mech. Assn.*, 4 Hun (N. Y.), 339, 341; 49 How. Pr. (N. Y.) 190.

<sup>59</sup> *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Pulford v. Fire Department*, 31 Mich. 458; *Angell & Ames on Corporations*, 9th ed., sec. 339, et seq.

<sup>60</sup> *Fogel v. Lycoming Ins. Co.*, 3 Grant Cas. (Pa.) 77.

<sup>61</sup> *Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.), 596.

<sup>62</sup> *State v. Curtis*, 9 Nev. 325; *Angell & Ames on Corporations*, sec. 358.

<sup>63</sup> *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.), 174. Whether by-law is void, see *Matt v. Roman Catholic M. Prot. Soc.*, 70 Iowa, 455.

**§ 372. By-laws Excluding Resort to Civil Courts.—**

That by-laws may not by their provisions wholly exclude members from resorting to the civil courts for remedies under contracts of insurance is substantially and by analogy held in several cases,<sup>64</sup> although cases to the contrary are numerous.<sup>65</sup> A distinction, however, should be made between those by-laws, or constitutional provisions which have reference to disputes of members among themselves, and those which apply to contests with the order over payment of losses under the contract.<sup>66</sup> So in Indiana, it is held that a by-law of a mutual benefit society which provides that a member claiming benefits must make proof of loss before certain subordinate officers, and, if their decision is against him, appeal to higher officers, whose decision shall be final, is valid in so far as it requires such an appeal to be taken before suit may be brought on the membership certificate, and void in so far as it declares the decision of the appellate tribunal final so as to bar a resort to the courts.<sup>67</sup>

**§ 373. By-laws must not be Contrary to Laws of State or United States.—**All by-laws must be consistent with the constitution and laws of the state and of the United States, as well as with particular statutes which relate to the corporation and which do not impair the charter obligation.<sup>68</sup> A by-law which is against the laws of the state or government

<sup>64</sup> *Stephenson v. Insurance Co.*, 54 Me. 70; *Supreme Council v. Garrigus*, 104 Ind. 133; 54 Am. Rep. 298; *Kinney v. Baltimore etc. Employees' Relief Assn.*, 35 W. Va. 385; 14 S. E. Rep. 8; 21 Ins. L. J. 176; *Sweeney v. Rev. Hugh McLaughlin B. Soc.*, 14 Week. Not. Cas. 466; *Mulroy v. K. of H.*, 28 Mo. App. 463; *Bauer v. Sampson Lodge*, 102 Ind. 262; *Elkhart Mut. etc. v. Houghton*, 98 Ind. 149; *Kestler v. Indianapolis etc. R. R. Co.*, 88 Ind. 460; *Wood v. Humphrey*, 114 Mass. 185.

<sup>65</sup> *Canfield v. Great Camp of Knights of the Maccabees*, 87 Mich. 626; 49 N. W. Rep. 875; 21 Ins. L. J. 3; 13 L. R. Annot. 625; *Scott v. Avery*, 5 H. of L. Cas. 811; *Anacosta Tribe v. Murbach*, 13 Md. 911; 71 Am. Dec. 625; *Cincinnati Lodge etc. v. Littlebury*, 6 Cin. L. Bull. 237.

<sup>66</sup> *Bukofzer v. United States Grand Lodge, I. O. S. of B.* (N. Y. 1891), 15 N. Y. Supp. 922; 40 N. Y. 653.

<sup>67</sup> *Supreme Council of Order of Chosen Friends v. Forsinger*, 125 Ind. 52; 25 N. E. Rep. 129.

<sup>68</sup> *Butchers' Beneficial Assn.*, 35 Pa. St. 151; *Angell & Ames on Corporations*, 9th ed., sec. 332, et seq.

is void and totally inoperative, and an act relative to the contract cannot be permitted under a by-law when such act would contravene the laws of the state.<sup>69</sup> A by-law is therefore void which requires that a member shall take part in a strike.<sup>70</sup> So it is held that a mutual insurance company created without any capital stock cannot create a capital stock by virtue of a by-law passed for that purpose, and thereby withdraw from the class of mutual corporations without capital stock to which it belongs;<sup>71</sup> and where a mutual insurance company in Massachusetts was authorized to do business as a stock company, a by-law which prohibited the continuance of the stock department and makes a division of the surplus accumulated thereunder is contrary to the general insurance laws of that state, and void.<sup>72</sup>

**§ 374. By-laws Against Public Policy are Void.**—That a by-law which is contrary to public policy is void, is well settled. But a by-law of a railroad relief association which requires the release of the railroad from any claim for damages before a member can apply to the association for relief is not invalid as against public policy.<sup>73</sup>

**§ 375. By-laws must not Contravene Terms of Charter.** By-laws are not valid which conflict with the charter or articles of association, for to acknowledge the power to enact such by-laws would admit the power of a corporation to re-create itself on such basis and for such purposes as it might desire, and wholly defeat the object of its original creation;<sup>74</sup> nor is a

<sup>69</sup> *Price v. Supreme Lodge etc.*, 68 Tex. 361; 4 S. W. Rep. 633.

<sup>70</sup> *People v. New York Ben. Soc.*, 3 Hun (N. Y.), 361. See *Snow v. Wheeler*, 113 Mass. 179.

<sup>71</sup> *State v. Utter*, 34 N. J. L. 489.

<sup>72</sup> *Traders & Mechanics' Ins. Co. v. Brown*, 142 Mass. 403.

<sup>73</sup> *Owens v. Baltimore etc. R. R. Co.*, 35 Fed. Rep. 715; *State v. Baltimore etc. Co.*, 36 Fed. Rep. 655; *Fuller v. Baltimore etc. Employees' Relief Assn.*, 67 Md. 433; 10 Atl. Rep. 237. See further on invalidity of by-laws which are inconsistent with state laws, *Briggs v. Earl*, 139 Mass. 473; *Angell & Ames on Corporations*, sec. 333, et seq.

<sup>74</sup> *Diligent F. Co. v. Commonwealth*, 75 Pa. St. 291; *Prest. Mut. Assn. Fund v. Allen*, 106 Ind. 593; *Bergmann v. St. Paul Mut. Bldg.*

member bound by his consent to by-laws which are invalid for the above reasons.<sup>75</sup> So a by-law which materially conflicts with the constitution of an unincorporated society is invalid, and must yield to the constitution.<sup>76</sup> Where a particular mode for obtaining funds for the payment of losses and expenses is provided by charter, a by-law is void which changes such specific provision and provides an entirely different mode therefor.<sup>77</sup> But the courts will not sustain an action by a member of a corporation to restrain it from enforcing against him a by-law of a mutual society which provides that it shall be the duty of every member to refuse to perform in any orchestra in which are any persons not members in good standing, and that it shall be deemed a breach of good faith between members to employ a suspended or nonmember, or to assist in a public performance given wholly or in part by amateurs, and which impose a penalty for their violation;<sup>78</sup> and a by-law cannot limit or extend benefits beyond the charter provisions prescribing the class entitled to benefits.<sup>79</sup> But a by-law which provides for forfeiture for nonpayment of an assessment does not contravene a charter provision that the officers may declare a policy forfeited for a like cause.<sup>80</sup>

**§ 376. Enforcement of By-laws—Penalty.**—The power to enact a by-law carries with it necessarily the power to enforce the same by a reasonable penalty, within the scope of the corporate purposes, and upon due notice and hearing.<sup>81</sup> So a

*Assn.*, 29 Minn. 278; *Angell & Ames on Corporations*, 9th ed., sec. 343, et seq.

<sup>75</sup> *People v. Benevolent Soc.*, 24 How. Pr. (N. Y.) 216.

<sup>76</sup> *Sherry v. Operative Plasterers' Mut. Union*, 139 Pa. St. 470; 20 Atl. Rep. 1062; *Powell v. Abbott*, 9 Week. Not. Cas. 231.

<sup>77</sup> *State ex rel. Monitor etc. Assn.*, 42 Ohio St. 555.

<sup>78</sup> *Daniels, J.*, dissenting; *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45; reversing 49 Hun (N. Y.), 171.

<sup>79</sup> *Legion of Honor v. Perry*, 140 Mass. 580; *Kentucky Masonic etc. v. Miller*, 13 Bush (Ky.), 489.

<sup>80</sup> *Equitable etc. v. McLennon* (Tenn.), 6 Ins. L. J. 124.

<sup>81</sup> See *Beadle v. Chenango Co. Ins. Co.*, 3 Hill (N. Y.), 161; *Angell & Ames on Corporations*, 9th ed., sec. 360, et seq.



member may be suspended for nonpayment of assessments;<sup>82</sup> but a by-law which subjects the member to a quasi penalty of deprivation of benefits for three months after he has paid dues in arrears for a certain time, is unreasonable, oppressive, and detrimental to the interests of the corporation.<sup>83</sup> And an amendment of the constitution which is *ex post facto* in its effect, in that it enforces a penalty not existing at the time of default in payment of dues by a member, is not valid.<sup>84</sup>

**§ 377. Power to Alter or Change By-laws.**—A mutual insurance corporation or association may change its rules, or dispense with their literal and rigorous enforcement, when by so doing no substantial rights of the company or the insured will be impaired.<sup>85</sup> The right of a corporation to alter, modify, or change its by-laws is generally reserved in the charter or articles of association, but aside from the reservation of such power it is said to be incident to the very nature and purposes of such organizations that they should have the right to make changes in their laws.<sup>86</sup> This principle is undoubtedly true, but in its application the courts widely diverge. An attempt has been made by some of the decisions to reconcile the cases on the common ground of vested rights, but here again the question of what constitute vested rights has been the subject of much discussion, and the decisions are far from unanimous, nor is the question settled as to what extent such societies are authorized to change their by-laws, where the power so to do is reserved in the charter or articles of association. We have seen that the fundamental law of organization of such societies, and the charter and by-laws constitute a part of the contract of each member,<sup>87</sup> and it would seem as if neither a corporation

<sup>82</sup> *Hansen v. Supreme Lodge K. of H.*, 140 Ill. 301; 29 N. W. Rep. 11 21.

<sup>83</sup> *Cartan v. Father Matthew United B. Soc.*, 3 Daly (N. Y.), 20. See *Conolly v. Shamrock B. Soc.*, 43 Mo. App. 283; *Cahill v. Kalamazoo Ins. Co.*, 2 Doug. (Mich.) 124; 43 Am. Dec. 457.

<sup>84</sup> *Pulford v. Fire Department*, 31 Mich. 459. See sections herein on forfeiture, etc.

<sup>85</sup> See *Protection L. Ins. Co. v. Foote*, 79 Ill. 361.

<sup>86</sup> *Fugure v. Society of St. Joseph*, 46 Vt. 369.

<sup>87</sup> Chapters 13, 15, herein.

nor association would have the inherent power to enact a by-law which materially and radically changes the contract with members; such societies can certainly have no inherent power to arbitrarily abrogate the provisions of a contract which members have entered into in good faith, nor may it divest members of rights which have become vested under their contracts. And a charter reservation of the right to modify and change by-laws, and to which a party consents by becoming a member, ought not to be construed to warrant the passing of a by-law which would operate to annul a member's contract and abrogate vested rights, or which would in effect be a repudiation of its obligations by the society.<sup>88</sup>

**§ 378. By-laws—Changes, How Made.**—Alterations or changes of by-laws must be made in the manner prescribed by its charter and by-laws, and where a by-law prescribes the time when such alteration can be made, and the number of votes required therefor, such provision must be followed.<sup>89</sup> Where the articles of a corporation provide for the management of its business by a board of directors, and for meetings of that board, but do not provide for meetings of the corporation, and the first by-laws were adopted by the directors, the latter have power to amend the by-laws.<sup>90</sup> An attempted amendment of the by-laws of a mutual benefit society is not binding on a member who did not attend the meeting, unless it is affirmatively shown to have been called and conducted as provided by the constitution.<sup>91</sup>

**§ 379. By-laws—Statutory or Charter Power to Repeal, Change, etc.**—It is undoubtedly true that a right may exist to repeal or amend by-laws, where provision is made therefor in the charter, act of in-

<sup>88</sup> *Supreme Commandery v. Ainsworth*, 71 Ala. 436; 46 Am. Rep. 332; *Insurance Co. v. Connor*, 17 Pa. St. 136; *Stewart v. Lea Mut. F. Ins. Assn.*, 64 Miss. 499; 1 S. Rep. 743. See *Korn v. Mut. Assur. Soc.*, 6 Cranch (U. S.), 192. See sections next ensuing herein.

<sup>89</sup> *Torry v. Baker*, 1 Allen (Mass.), 120.

<sup>90</sup> *Heintzelman v. Druids' Relief Assn.*, 38 Minn. 138; 36 N. W. Rep. 100.

<sup>91</sup> *Metropolitan Safety Fund Acc. Assn. v. Windover*, 137 Ill. 417; 27 N. E. Rep. 538.

corporation, or fundamental law of the corporation or association. Thus in the case of *Stohr v. San Francisco etc. Society*<sup>92</sup> the defendant was incorporated, and both the general laws of the state and the by-laws of the society gave it the right to repeal, alter, or amend its laws. After a member's sickness a by-law was passed limiting the allowance to which he was entitled to a certain amount, unless otherwise ordered by the board of directors, and the by-law was declared to be valid. So it is held in New York that where the constitution provides that the by-laws may be amended, the society may alter them, even after a member has been taken sick, and reduce the amount of his benefits.<sup>93</sup> It is declared in another case in the same state that the constitution and by-laws may be changed, and the member becomes bound where the amendment is made in accordance with the constitution and laws, even without notice to the member, in the absence of a provision therefor in the constitution or by-laws.<sup>94</sup> Again, it is held that where, by statute, insurance companies have the right to amend their charters, a person who takes a policy from a company, the charter of which provides for the surrender of policies and compensation thereupon, cannot be heard to complain of a subsequent abrogation of this provision.<sup>95</sup> So a member who continues to pay assessments after a change in the by-laws in relation thereto is estopped to deny the power to amend such by-laws;<sup>96</sup> and where there is an express provision in the constitution of an association that the society may alter or change its by-laws, and the manner of doing it is specifically pointed out, such amendment may be made.<sup>97</sup> But if the power to alter a by-law is reserved, that power can-

<sup>92</sup> 82 Cal. 557; 22 Pac. Rep. 196.

<sup>93</sup> *Poultney v. Backmann*, 31 Hun (N. Y.), 49; overruling 62 How. Pr. (N. Y.) 466.

<sup>94</sup> *McCabe v. Father Matthew etc. Soc.*, 24 Hun (N. Y.), 149.

<sup>95</sup> *Allen v. Life Assn. of America*, 8 Mo. App. 52.

<sup>96</sup> *Struve v. Grand Lodge Ohio A. O. of U. W.*, 5 Ohio C. C. 471; 26 Week. L. Bull. 471.

<sup>97</sup> *Fugure v. Society of St. Joseph*, 46 Vt. 369. See, also, *Poultney v. Blackman*, 31 Hun. (N. Y.) 49; overruling 62 How. Pr. (N. Y.) 466, and 10 Abb. N. C. (N. Y.) 252.

not be exercised to enact unreasonable by-laws, even though the by-law is substantially an enactment of another on the same subject.<sup>98</sup> It is also held that a total nonobservance of a by-law operates as a repeal thereof.<sup>99</sup> And where, under the charter of a mutual fire insurance association, the incorporators are authorized to make such by-laws as they may deem advisable for the management of their corporate affairs, such by-laws can have no effect to modify contracts entered into between the corporation and the assured;<sup>100</sup> nor does the reservation of a right to alter or change a by-law enable the society to repudiate a debt and reduce the amount to which a member is entitled for benefits by a by-law enacted after the right of the claimant has accrued.<sup>101</sup> So resolutions passed by the board of directors of a mutual insurance company suspending the policy of a member does not affect a policy holder having no notice of their passage.<sup>102</sup>

**§ 380: Change of By-laws—Vested Right.**—It is the rule that by-laws cannot disturb a vested right;<sup>103</sup> but members may assent to a by-law which would not bind strangers or non-dissenting members, and such by-law would be good as a contract as to assenting parties.<sup>104</sup> But what constitutes a vested right is a question upon which the courts differ. Supposing the contingency has arisen which the contract provides against, and upon the happening of which the benefit is to accrue or the loss to be paid. The contract is to be interpreted like one of insurance, and it would reasonably seem that a power to abrogate the provision of the agreement would not exist, for the express terms of a contract of insurance cannot be changed by

<sup>98</sup> *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

<sup>99</sup> *Attorney General v. Middleton*, 2 Ves. Sr. 328.

<sup>100</sup> *Stewart v. Lee Mut. F. Ins. Assn.*, 64 Miss. 499; 1 S. Rep. 743.

<sup>101</sup> *Pellazino v. German etc. Soc.*, 16 Cin. W. L. Bull. 27.

<sup>102</sup> *Martin v. Mutual F. Ins. Co. of Montgomery Co.*, 45 Md. 51.

<sup>103</sup> *Morrison v. Wisconsin Odd Fellows' etc. Co.*, 59 Wis. 162. But see *Figure v. Society of St. Joseph*, 49 Vt. 362.

<sup>104</sup> *Stetson v. Kempton*, 13 Mass. 282. "What may be bad as a by-law as against common right may be good as a contract": *Angell & Ames on Corporations*, 9th ed., sec. 342.

a by-law without the consent of the insured.<sup>105</sup> So where a provision of the charter and a by-law of an insurance company constitute part of a contract of insurance, their alteration without the consent of the insured cannot affect the contract.<sup>106</sup> Again, it is held that a by-law cannot be amended, after the right to benefits has accrued, so as to reduce the amount it would otherwise be obligated to pay.<sup>107</sup> There are decisions, however, which not only hold that where a member has no vested right in a fund the society may change the disposition of the fund,<sup>108</sup> and also that a by-law in existence when a member claims relief, and not the one in existence at the time he became a member, is the one under which he is entitled, as the society has the right to amend such a by-law.<sup>109</sup> It is further held that if a member has deceased, the society may amend its by-laws limiting the amount of recovery to which his widow would have been entitled before the alteration.<sup>110</sup> So in a California case<sup>111</sup> it is decided that a by-law limiting the amount of recovery, enacted after the right to claim relief has accrued, does not impair vested rights, since it is not retroactive. The commissioner's opinion adopted by the court is as follows: "It is contended for the respondent that the by-law giving a right to benefits constituted a contract, which could not be changed, and the question presented is, whether the defendant had power to change said by-law in the way it did. Undoubtedly, when the plaintiff complied with what was required of him as a member, the by-laws constituted a contract; and unless the contract itself otherwise provided, it could not be changed without the consent of all the parties. But here the contract itself does provide otherwise; . . . there is an express provision that the by-laws may be changed; . . . the

<sup>105</sup> *Insurance Co. v. Harvey*, 45 N. H. 292; *Becker v. Farmers' Mut. etc.*, 48 Mich. 610; *Gundlach v. Germania Mech. Assn.*, 49 How. Pr. (N. Y.) 190; *Morrison v. Wisconsin Odd Fellows' etc.*, 59 Wis. 162.

<sup>106</sup> *Morrison v. Wisconsin Odd Fellows' etc.*, 59 Wis. 162.

<sup>107</sup> *Becker v. Berlin B. Soc.*, 144 Pa. St. 232; 22 Atl. Rep. 699.

<sup>108</sup> *Torrey v. Baker*, 1 Allen (Mass.), 120.

<sup>109</sup> *St. Patrick's Male Soc. v. McVey*, 92 Pa. St. 510.

<sup>110</sup> *Fugure v. Mutual Soc. of St. Joseph*, 46 Vt. 362.

<sup>111</sup> *Stohr v. San Francisco etc. Soc.*, 82 Cal. 557; 22 Pac. Rep. 196.

law provides that the by-laws may be changed. This provision must be held to enter into and form a part of the contract. . . . In view of this power to alter the contract, it cannot be said that the defendant could not alter its by-laws in any respect. The respondent argues, however, that it had no power to alter them so as to impair a vested right. This must be conceded, but we do not think that the new by-law purported to impair a vested right. The term 'vested right' is often loosely used. In one sense every right is vested. If a man has a right at all, it must be vested in him; otherwise, how could it be a right? The moment a contract is made, a right is vested in each party to have it remain unaltered and to have it performed. The term, however, is frequently used to designate a right which has become so fixed that it is not subject to be divested without the consent of the owner, as contradistinguished from rights which are subject to be divested without his consent. Now, a right, whether it be of such a fixed character or not, must be a right to something; and when a man talks vaguely of his vested right, it conduces to clearness to ask: 'A vested right to what?' In the present case the plaintiff can have no right to have the contract remain unchanged, because, as we have seen, the contract itself provides that it may be changed. Nor has he a right to remain unaffected by any change that may be made; for if such right be common to all the members, it is merely another way of saying that no change can be made, and if the right be not common to the other members, it would be to assert a privilege or superiority over them, of which there is no pretense. If the plaintiff has any right which is so fixed that it is not subject to change, we think it can only be to the fruits which ripened before the change was made; in other words, to such sums as became due before the new by-law was adopted. To express it differently, the change could not be retroactive. This is all that we think can be meant by 'vested right,' in a case like the present. Now, under the contract, nothing was due before the sickness actually took place. Benefits do not accrue for future sickness. The right of the plaintiff to benefits for future sickness is not different in its nature from the right of the well members to

benefits for future sickness. In the one case the members have a right to future payment in case they become sick; in the other, the plaintiff has a right to future payments in case he continues sick, and if there was no power to change the by-law in the one case, there was no power to change it in the other; which is equivalent to saying that there was no power to change it at all. The cases where a specific sum becomes due upon the happening of a certain event, as upon death, are not like the present. In such cases an alteration in the contract cannot be made after the fact; for that would be to make that not due which had already become due. It might, perhaps, be argued that the foregoing would apply if the by-law under consideration had specified that the weekly payments were to continue as long as the sickness continued. But it does not so specify. The time during which the payments were to continue is left indefinite. The substance of the contract is, in our opinion, that, in case of sickness, the member is to receive weekly payments for an indefinite period of sickness, subject to the power of the defendant to change the provision authorizing such payments, so far as future payments are concerned." So in New York, articles of association which provide for the payment to widows of a certain sum a month may be amended so as to change the amount of benefits, but such change is not retroactive, and the beneficiary will be entitled to the benefits under the original provision.<sup>112</sup> So a society may limit the payments of benefits until there shall be a certain sum in the treasury by a by-law enacted after the party claiming to be entitled to benefits had become a member.<sup>113</sup>

**§ 381. Construction of By-laws.**—In construing by-laws, they will be given effect as far as possible.<sup>114</sup> They will also be construed to sustain the contract, rather than uphold a forfeiture,<sup>115</sup> and a reasonable construction will be given, due

<sup>112</sup> *Gundlach v. Germania etc. Assn.*, 4 Hun (N. Y.), 341.

<sup>113</sup> *St. Patrick's etc. Soc. v. McVey*, 92 Pa. St. 510.

<sup>114</sup> *Elsev v. Odd Fellows' Assn.*, 142 Mass. 224. They should be construed liberally: *Morawetz on Corporations*, ed. 1882, sec. 369; 1 *Id.*, 2d ed., sec. 497.

<sup>115</sup> *Evans v. Phoenix Mut. Relief Assn.*, 9 Lanc. Law Rev. (Pa.) 59;

regard being had to the rights of members and the purpose of their enactment; trivial reasons will not warrant their being held invalid, nor will they be closely scrutinized with that intent.<sup>116</sup> The reasonableness of a by-law is a question of construction for the court.<sup>117</sup>

49 Leg. Intell. 15; *Schinck v. Gegenzeiter*, 44 Wis. 369; *Erdmann v. Mutual Ins. Co.*, 44 Wis. 376.

<sup>116</sup> *St. Mary's B. Soc. v. Burford*, 70 Pa. St. 321; *Genest v. L. Union etc.*, 141 Mass. 417; *Fritz v. Muck*, 62 How. Pr. (N. Y.) 69, 72.

<sup>117</sup> *People v. Throop*, 12 Wend. (N. Y.) 186; *Commonwealth v. Worcester*, 3 Pick. (Mass.) 462; *Angell & Ames on Corporations*, 9th ed., sec. 357.



## CHAPTER XVII.

### AGENTS OF INSURER: APPOINTMENT, ETC.—POWERS.

- § 386. Corporations act through agents.
- § 387. Charter provisions concerning agents.
- § 388. Who are insurance agents.
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- § 390. Appointment of agents.
- § 391. Appointment of agents: Statutes.
- § 392. Appointment of agents: Territory: Contract with principal.
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- § 394. Same subject: Powers after completion of contract.
- § 395. Who is general agent.
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- § 399. Powers of president.
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- § 410. Agency—Person referred to by company.
- § 411. Powers of clerk.
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- § 413. Whether one is agent or broker.
- § 414. Whether broker is agent of insured or insurer.
- § 415. Partnership as agent: Joint agents.
- § 416. Powers of adjuster.

§ 386. **Corporations Act Through Agents.**—Insurance corporations must act through agents, especially so in case of corporations doing business in foreign territory. Every mem-

ber of a corporation or association is therefore presumed to agree, on becoming such member, that the organization shall act through such agents as are reasonably necessary for the transaction of its business, and unless the charter or act of appointment provides otherwise, that they shall possess or exercise all such powers as the nature of their appointment shall require.<sup>1</sup>

§ 387. **Charter Provisions Concerning Agents.**—We have already given some consideration to the question of limitations imposed upon insurance corporations and associations by the charter or articles of association.<sup>2</sup> There are certain class agents, such as general officers and boards of directors, managing officers, and the like, who derive their authority, directly or impliedly, from the charter. Although their general authority permits the exercise of a wide discretion, nevertheless, if the charter prescribes the mode of exercise of their authority, and it is apparent that the legislature intended such mode as exclusive of all others, the prohibition must be observed.<sup>3</sup> An agent has apparent authority to insure in the modes authorized by the company's charter, and upon the terms and conditions inserted in their policies in ordinary use.<sup>4</sup> Insurance companies are bound by the acts of agents not prohibited by their charter and within the limits which may reasonably be presumed by the public from the character of the business and the general mode of transacting it.<sup>5</sup> It is held in an Illinois case<sup>6</sup>

<sup>1</sup> *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 528, per Dutton, J.; *Protection Life Ins. Co. v. Foote*, 79 Ill. 361, per Scholfield, J.; *Insurance Co. v. Gibson*, 72 Miss. 64, per Whitfield, J.; *Lattorous v. Farmers' Mut. F. Ins. Co.*, 3 Houst. 404. See Angell & Ames on Corporations, 9th ed., secs. 231, 276, et seq.; Bliss on Life Insurance, ed. 1872, sec. 273, et seq. As to the powers of corporate agents generally, see Thompson on Corporations, ed. 1895-96, c. civ, sec. 4873, et seq.

<sup>2</sup> See secs. 35, 36, 53, and chapters 13, 15 herein.

<sup>3</sup> See sec. 35. herein. Examine Angell & Ames on Corporations, 9th ed., secs. 231, 280, 291.

<sup>4</sup> *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 594; 19 Am. Rep. 305, and note, 309. See *Reynold v. Continental Ins. Co.*, 36 Mich. 131.

<sup>5</sup> *Kenton Ins. Co. v. Shea*, 6 Bush (Ky.), 174; 99 Am. Dec. 676.

<sup>6</sup> *Farmers' & Merchants' Ins. Co. v. Chestnut*, 50 Ill. 111; 99 Am. Dec. 492.

that an authorized agent has power to sign an agreement giving permission for an enhanced premium which was paid to remove property, although the charter required that agreements relating to insurances should be signed by the president and secretary.<sup>7</sup>

**§ 388. Who are Insurance Agents.**—Insurance agents are persons expressly or impliedly authorized to represent either the insurer or insured in matters relating to insurance. Agents may directly represent the principal, or they may belong to the class designated as subagents, who are employed by the principal agent, and frequently brokers are thus employed.<sup>8</sup> A person was held to be an agent of the company where it appeared that a circular signed by the general agent was addressed to such person as "agent," referring to his "agency," and fully instructing him as to his duties in that capacity. He thereafter acted as agent, informed the general agent of the loss, and received a reply and instructions from him.<sup>9</sup> And the possession by an insurance agent of blank policies, to which the signatures are affixed of the company's president and secretary, afford sufficient evidence of a general agency to justify a person's contracting for insurance with him, and to accept a policy delivered by him.<sup>10</sup> So a party employed as a watchman by the owner of the property may issue a policy thereon as agent of an insurance company.<sup>11</sup> Where a soliciting agent solicits one to become a member of a mutual benefit association, pretending to be its agent, and produces and fills out the application which is sent to the association, acted on by it in issuing a certificate, and said certificate is sent to the apparent agent, who delivers it to assured and collects the premium, an agency is established.<sup>12</sup>

<sup>7</sup> See sec. 35, 36, herein, for a consideration of this question.

<sup>8</sup> See Ewell's *Evans on Agency*, c. 1, for definitions of the different kinds of agents and distinctions between them.

<sup>9</sup> *Hamilton v. Home Ins. Co.*, 94 Mo. 353; 7 S. W. Rep. 201.

<sup>10</sup> *Howard Ins. Co. v. Owens*, 94 Ky. 197; Ky. Law Rep. 237.

<sup>11</sup> *Northrup v. Germania F. Ins. Co.*, 48 Wis. 420; 33 Am. Rep. 815.

<sup>12</sup> *Whitney v. National Masonic Acc. Assn.*, 57 Minn. 472, 490; 59 N. W. Rep. 943, per Collins, J.; distinguishing *Gude v. Exchange F. Ins. Co.*, 53 Minn. 220; 54 N. W. Rep. 1117; and citing *Abraham v.*

§ 389. **Classification of Agents.** — In classifying agents a distinction has been made as to their powers, between the different kinds of agents, and between those representing the different kinds of insurance, such as life, fire, and marine.<sup>13</sup> This distinction may be of some importance where third parties dealing with such agents have knowledge of whatever limitations such distinction may import. But the main questions are, What authority was the agent held out by the principal to possess? Were the agent's acts within the scope of his real or apparent authority? Did the person dealing with such agent have knowledge of restrictions or limitations upon the agent's authority?<sup>14</sup> As a general rule, the general principles of agency applicable to all agents govern the acts of insurance agents.<sup>15</sup>

North German Ins. Co., 40 Fed. Rep. 717; *Hahn v. Assurance Co.*, 23 Or. 576; 32 Pac. Rep. 683; *Gosch v. Association*, 44 Ill. App. 263; *Pierce v. People*, 106 Ill. 11; *Deitz v. Providence etc. Ins. Co.*, 31 W. Va. 851; 8 S. E. Rep. 616; *Insurance Co. v. Williams*, 39 Ohio St. 584; *Packhard v. Dorchester Mut. Ins. Co.*, 77 Me. 144; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; 28 N. W. Rep. 47.

<sup>13</sup> See Richards on Insurance, pp. 20-26, secs. 16-19. "There seems to be no very well defined distinction between the powers of general agents, local agents, and subagents": 1 May on Insurance, 3d ed., 221, sec. 126. "The distinction between special and general agents is of little or no practical value, so far at least as regards the principal and third parties": Ewell's Evans on Agency, 2.

<sup>14</sup> See chapters, post, on Agents; Ewell's Evans on Agency, ed. 1879, c. 1, p. 2, et seq; Story on Agency, sec. 127, note; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 236; 2 Wood on Fire Insurance, 2d ed. 860, sec. 416.

<sup>15</sup> See *Markey v. Mutual B. Ins. Co.*, 103 Mass. 78, 93. "There are no principles which belong exclusively to agency in insurance matters; none, that is, which are not recognized as a part of the general law of agency. But there are some peculiarities in the application of these principles": 2 Parsons on Marine Insurance, ed. 1868, 416. "The same rules apply to insurance companies as apply in the case of individuals, and a person who is clothed with power to act for them at all is treated as clothed with authority to bind them, as to all matters within the scope of his real or apparent authority": 2 Wood on Fire Insurance, 2d ed., 822, sec. 408, citing *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566; *Eclectic Fire Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Warner v. Peoria Mut. & F. Ins. Co.*, 14 Wis. 318, and numerous other cases.

§ 390. **Appointment of Agents.**—An agent's authority may arise by virtue of a valid express appointment by deed, or writing under seal, or it may rest in parol.<sup>16</sup> It may be implied from usage, from custom, or from a course of dealing sanctioned by the principal; or it may exist under an express ratification by the principal; or the implied authority may arise where the party's own acts are such as to constitute him an agent, or the agency may be created by a necessity justifying immediate action.<sup>17</sup> And this is true not only of agents of the insurer, but also of agents of the insured.<sup>18</sup> Where the charter and by-laws prescribe the performance of certain formalities as conditions precedent to the agent's authority to act, such matters relate to the management of the internal affairs of the company. Therefore, a party who deals with such agents has, in the absence of notice to the contrary, the right to assume that such formalities have been complied with, and may deal with the agent within the scope of his apparent authority. The corporation is also estopped from setting up noncompliance by the agent with the prescribed conditions.<sup>19</sup> But so far as the appointment itself is concerned, it is not valid unless made in conformity with such formalities as the charter prescribes, where the charter sets forth the requirements,<sup>20</sup> although an irregular or informal appointment may be ratified, either expressly or

<sup>16</sup> *Ewell's Evans on Agency*, 22-32, \*16-\*23; *Swazey v. Union Mfg. Co.*, 42 Conn. 556; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 646. As to appointment of agents under statutes, see sec. 391, herein.

<sup>17</sup> See *Mechem on Agency*, ed. 1889, c. iv, sec. 80, et seq.; *Story on Agency*, 9th ed., c. v, sec. 45, et seq.; *Wharton on Agency*, sec. 134; *Union etc. Min. Co. v. Rocky Mountain Nat. Bank*, 2 Col. 248; and chapters, post, on Agents.

<sup>18</sup> See *Barlow v. Leckle*, 4 Moore J. B. 8; *Ewell's Evans on Agency*, ed. 1879, 22-32, side pp. 16-23.

<sup>19</sup> *Bank of United States v. Dandridge*, 12 Wheat. (U. S.) 64, 70, per *Story, J.*; *In re County Life Assur. Co.*, L. R. 5 Ch. 293, per *Giffard, L. J.*; *Insurance Co. v. McCain*, 96 U. S. 84; 2 *Morawetz on Private Corporations*, 2d ed., sec. 637, et seq.

<sup>20</sup> *Henning v. United States Ins. Co.*, 47 Mo. 425; *Head v. Providence Ins. Co.*, 2 Cranch (U. S.), 127. See *Commercial etc. Ins. Co. v. Union etc. Ins. Co.*, 19 How. (U. S.) 318; *Badgers v. American etc. Ins. Co.*, 103 Mass. 244; 4 Am. Rep. 547.

impliedly, by acts of the corporation.<sup>21</sup> In regard to special or class agents, the charter may prescribe who shall act as agents in transacting and managing certain affairs of the corporation; such charter agents, therefore, must look to the charter as the source of their authority.<sup>22</sup> Where an agent's written commission expressly excludes authority to insure manufactories and other special hazards, it cannot be assumed merely from the fact that he is the company's local agent, that his authority is unlimited as to risks and terms. Nothing more can be implied therefrom than an authority to insure in the mode required by the company's charter, and to take only such risks as the policies ordinarily used by the company would warrant.<sup>23</sup> A person may by his own acts become an agent where he had no prior authority. So where a third party collects and holds premiums, he thereby becomes a bailee of the company, and must account to it or its agent for money so received and held.<sup>24</sup> An agent's authority may arise from a habit and course of business acquiesced in by the principal.<sup>25</sup>

**§ 391. Appointment of Agents—Statutes.**—In the case of foreign insurance companies, the statutes of many states impose certain conditions upon them in relation to the appointment of agents acting within the state. The failure to comply with such requirements goes to the question of the validity of acts done by such agents.<sup>26</sup> Where a person, as

<sup>21</sup> See *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 342; 2 *Morawetz on Corporations*, 2d ed., sec. 637; *Ewell's Evans on Agency*, ed. 1879, c. iv, p. 192, side p. 136, et seq.

<sup>22</sup> See *Bank v. Danbridge*, 12 Wheat. (U. S.) 113, per Marshall, C. J.; *Beatty v. Marine Ins. Co.*, 2 Johns. (N. Y.) 109; 3 Am. Dec. 401; *Washington T. Co. v. Crane*, 8 Serg. & R. (Pa.) 521, 522; *Angell & Ames on Corporations*, 9th ed., sec. 279.

<sup>23</sup> *Reynolds v. Continental Ins. Co.*, 36 Mich. 131.

<sup>24</sup> *Fagan v. Missouri Ins. Co.*, 31 Ark. 54.

<sup>25</sup> *Franklin v. Globe Mut. Life Ins. Co.*, 52 Mo. 461; *Putnam v. Home Ins. Co.*, 123 Mass. 324; 25 Am. Rep. 93.

<sup>26</sup> Cases where failure to comply invalidates: *Cincinnati Mut. Assur. Co. v. Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626; *Thorne v. Travelers' Ins. Co. (Pa.)*, 5 Ins. L. J. 169; 80 Pa. 15; 21 Am. Rep. 89; *Franklin Ins. Co. v. Louisville etc. Packet Co.*, 9 Bush (Ky.), 590; *Williams v. Cheney*, 8 Gray (Mass.), 206; *Haverhill Ins. Co. v. Prescott*, 42

"inspector" of risks for a foreign company not authorized to do business in a certain state, solicits insurance therein, assuming to act as an agent, and reports a risk to the company, which issues in consequence a policy and receives the premium, he is an agent of the company, and is within the prohibition of the statutes relating thereto.<sup>27</sup>

**§ 392. Appointment of Agents—Territory—Contract with Principal.**—If a person secures an appointment for an insurance company as district agent for a certain territory, under a contract which does not stipulate for an exclusive right to act as sole agent therein, it is not a breach of the contract to appoint another agent in the same territory where the contract also provides that commissions shall be divided between him and other agents on business obtained by them acting conjointly in the given district;<sup>28</sup> and where one is appointed as a manager of a certain department, embracing the whole of one state and such portions of two other states as are "acceptable to the association," the principal may terminate the contract, and is not liable in damages where the agent fails to secure a certain amount of new business provided for in the contract, nor is the company unconditionally obligated to keep open the two other states,<sup>29</sup> and it is held that where an agent is appointed to act in a certain locality and its vicinity, the word "vicinity" will include a village within ten miles of such locality.<sup>30</sup> The company may validly stipulate that the agent shall serve on its president or secretary a written statement of his claim a certain number of days before bringing an action thereon against the

N. H. 547; 80 Am. Dec. 123. Cases contra: *Provincial Ins. Co. v. Lapsley*, 15 Gray (81 Mass.), 262; *Clark v. Middleton*, 19 Mo. 53; *The Manistee*, 5 Biss. (C. C.) 81; *Thornton v. Western Reserve Fire Ins. Co.*, 31 Pa. St. 529. See *Crutcher v. Kentuck*, 141 U. S. 47. See actions against agents of foreign companies under chapter on Agents.

<sup>27</sup> *List v. Commonwealth*, 118 Pa. St. 322; 12 Atl. Rep. 277, under Pa. Act, April 4, 1873.

<sup>28</sup> *Lester v. New York Life Ins. Co.*, 84 Tex. 87; 19 S. W. Rep. 356.

<sup>29</sup> *Sibley v. Mutual Reserve Fund L. Assn.*, 87 Ga. 738; 13 S. E. Rep. 838.

<sup>30</sup> *Howard Ins. Co. v. Owen*, 94 Ky. 197; 13 Ky. Law Rep. 237.

company, and such an agreement is binding on the agent in the absence of fraud.<sup>31</sup>

**§ 393. Relative Powers of Agents of Stock and Mutual Companies.**—Some discussion has been had upon the point whether any distinction exists between the powers of agents of stock and mutual insurance companies. It is held by some courts that the agents of stock companies are invested with larger powers, in matters relating to completion of the contract and waiver of its terms, than are possessed by agents of companies formed on the mutual system, where the rights of all the members are alike regulated and governed by the by-laws which enter into and form a part of the contract with every member.<sup>32</sup> This distinction may be important, so far as concerns the authority of the agent to act on matters relating to the contract subsequent to its completion. But it is well settled that an applicant for insurance in a mutual company is a stranger to the by-laws, nor does the presumption of knowledge thereof arise against him until he becomes a member.<sup>33</sup> And the fact that one becomes a member of a mutual insurance company cannot operate to convert the previous acts of examination and description by the agent of the company into the act of the in-

<sup>31</sup> *Better v. Providential Ins. Co.*, 16 Daly (N. Y.), 344; 32 N. Y. 686; 11 N. Y. Supp. 70.

<sup>32</sup> *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6. See *Brewer v. Chelsea Mut. F. Ins. Co.*, 14 Gray (80 Mass.), 203; *Kausal v. Minnesota Farmers' Mut. F. Ins. Assn.*, 31 Minn. 17; 47 Am. Rep. 776, per Mitchell, J.; *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. (Pa.) 348; *Bacon on Benefit Societies and Life Insurance*, sec. 147; 1 May on Insurance, 3d ed., sec. 127.

<sup>33</sup> *Meyers v. Lebanon Mut. Ins. Co.*, 156 Pa. St. 420, 425, per Williams, J.; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331, 340, per Woodward, C. J. See *Kausal v. Minnesota Farmers' Mut. F. Ins. Assn.*, 31 Minn. 17; 47 Am. Rep. 776, 779; *Ellenberger v. Protection etc. Ins. Co.*, 89 Pa. St. 464; *In re County Life Assur. Co.*, L. R. 5 Ch. 288, 293; *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 579; 11 Vroom, 568; 29 Am. Rep. 271, 280, per Depue, J. "There is no general rule compelling persons dealing with a corporation at their peril to take notice of its by-laws": 2 Morawetz on Private Corporations, 2d ed., sec. 593. See *Conover v. Insurance Co.*, 1 N. Y. 292. But see *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. (Pa.) 348, 351, per Gibson, C. J.



sured, and change them into representations made by him,<sup>34</sup> although it is held that all persons applying to become members of an incorporated insurance company must be presumed to have known the terms of its charter and by-laws.<sup>35</sup> Though there are many decisions to the contrary upon the general proposition in courts of last resort.<sup>36</sup> The better opinion, however, would seem to be that by-laws as to persons not members of the company, in so far as they limit an agent's apparent authority, are substantially secret restrictions thereon, and, in the absence of actual or constructive notice, are not binding on those dealing with such agent.<sup>37</sup> At least such a rule ought to govern upon analogous principles with those from which a like rule is deduced in cases of agents of stock companies, especially where the by-laws contain conditions of which the applicant had no knowledge prior to the completion of the contract, and which he could not, under the law, be presumed to have had in contemplation in negotiating for insurance.

**§ 394. Same Subject—Powers after Completion of Contract.**—If, under the by-laws of a mutual insurance company, its agent in a certain place has authority to take ap-

<sup>34</sup> See *Lycoming Fire Ins. Co. v. Woodworth*, 83 Pa. St. 223, per Gordon, J.; *Cumberland Valley Ins. Co. v. Schell*, 29 Pa. St. 31; *Klister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Beebe v. Hartford Mut. F. Ins. Co.*, 25 Conn. 51; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; 30 Am. Rep. 531; *Eilenberger v. Protection Ins. Co.*, 89 Pa. St. 464; *Kausal v. Minnesota Farmers' Mut. F. Assn.*, 31 Minn. 17; 47 Am. Rep. 776. See chapters, post, on Agents.

<sup>35</sup> *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 333.

<sup>36</sup> See *Mulrey v. Shawmut F. Ins. Co.*, 4 Allen (Mass.), 116; 81 Am. Dec. 689; *Klibbe v. Hamilton Mut. Ins. Co.*, 11 Gray (77 Mass.), 163; *Wilson v. Conway Mut. F. Ins. Co.*, 4 R. I. 141; *Smith v. Farmers' Mut. Ins. Co.*, 19 Ohio St. 287; *Susquehanna Ins. Co. v. Perrine*, 7 Waits & S. (Pa.) 348; *McCoy v. Metropolitan L. Ins. Co.*, 133 Mass. 85; *Franklin F. Ins. Co. v. Martin*, 41 N. J. L. 568; 29 Am. Rep. 271.

<sup>37</sup> See *In re County Life Assur. Co.*, L. R. 5 Ch. 288, 293; *Fay v. Noble*, 12 Cush. (66 Mass.) 1, 16, et seq., per Shaw, C. J.; *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67, and other cases cited in 2 *Morawetz on Private Corporations*, 2d ed., secs. 593, 594. See, also, cases in note 34 above.

plications and receive premiums, and to deliver the same to the company, and no application or renewal is binding upon the company until approved by the secretary, and such agent only receives a specified sum, in case of acceptance, he ceases to be the company's agent immediately the contract is completed, and has no authority after the contract is completed to waive any of its conditions.<sup>38</sup> Where the contract has been completed and a person has become a member of a mutual insurance company, the above considerations become merged in the fact that as such member such person is, as already stated, charged with notice of whatever restrictions on the agent's authority are imposed by the charter and by-laws. The question then resolves itself into that of whether such inhibitions are conclusive or not. The determination of this point must necessarily involve the kindred ones, viz.: 1. To what extent, if at all, can the company itself, or through its agent, enter into contracts which are not strictly warranted by the charter? or 2. To what extent can it in a particular case waive by-laws which are applicable alike to all members by reason of the mutuality of the system of insurance? In the case of *Kausal v. Minnesota Farmers' Mutual Fire Insurance Association*<sup>39</sup> the court considers the question of whether any distinction exists between agents of stock and mutual companies, and holds that such a distinction did not exist in that case, for there the stipulations claimed to bind the assured were only in the policy, and the court adds: "We fail to see any distinction between the two kinds of companies, and we feel confident that the average applicant for insurance is rarely aware of any." But the force of this statement is somewhat modified as to dealings with the agent subsequently to effecting the policy, for it is evident that the court had in mind only negotiations concerning the application; that is, acts and representations of the agent before completion of the contract. The court concludes as follows: "But in apply-

<sup>38</sup> *Bourgeois v. Mutual F. Ins. Co.*, 86 Wis. 402, 407; 57 N. W. Rep. 338, per Cassaday, J.; citing *Haukins v. Rockford Ins. Co.*, 70 Wis. 4; *Knudson v. Hekla F. Ins. Co.*, 75 Wis. 198; *Bosworth v. Merchants' F. Ins. Co.*, 80 Wis. 393; *Stevens v. Queen Ins. Co.*, 81 Wis. 335.

<sup>39</sup> 31 Minn. 17; 47 Am. Rep. 776.

ing and contracting for insurance the applicant and the company are as much two distinct persons as in case of a stock company, and we see no reason for holding the agent who takes the application any less the agent of the insurer in the one case than in the other. The membership does not begin until the policy is issued. As to all previous negotiations the agent acts only for the company." Many courts of high authority have held to a strict construction in such matters in favor of the insurer, and have declared unequivocally that officers and agents of mutual insurance companies have no authority to waive its by-laws;<sup>40</sup> although it is held that the directors of a mutual company or their officers, by their direction or approval, may so act as to entitle a person to become a member who, by their fault, has been prevented from depositing his note, and as to authorize a court of equity to compel his being received, or to give the same relief he would be entitled to if he was.<sup>41</sup> We have seen, however, that the courts will, in certain cases, uphold contracts, even though made in excess of the charter powers of corporations,<sup>42</sup> although the general rule is to the contrary,<sup>43</sup> and that by-laws may likewise be waived, especially where the matter is not mandatory nor of the essence of the contract.<sup>44</sup> It is said in a Minnesota case that there is no dif-

<sup>40</sup> See secs. 35, 36, ante; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Behler v. German Ins. etc. Co.*, 68 Ind. 354; *Brewer v. Chelsea Mut. F. Ins. Co.*, 14 Gray (80 Mass.), 209; *Miller v. Hillborough F. Assn.*, 42 N. J. Eq. 459; *Brewer v. Chelsea Mut. F. Ins. Co.*, 14 Gray (80 Mass.), 203; *Evans v. Tremontain Mut. F. Ins. Co.*, 9 Allen (91 Mass.), 329; *Hale v. Mechanics' Mut. F. Ins. Co.*, 6 Gray (Mass.), 169; 66 Am. Dec. 410; *Messereau v. Phoenix Mut. L. Ins. Co.*, 66 N. Y. 274. *Examine 1 Morawetz on Private Corporations*, 2d ed., sec. 501.

<sup>41</sup> *Belleville Mut. Ins. Co. v. Van Winkle*, 12 N. J. Eq. 340, per *Elmer, J.*

<sup>42</sup> Secs. 35, 36, herein.

<sup>43</sup> See secs. 35, 36, herein; *Borgraefe v. Supreme Lodge etc.*, 22 Mo. App. 127; *Head v. Providence Ins. Co.*, 2 Oranch (U. S.), 127; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Brewer v. Chelsea M. F. Ins. Co.*, 14 Gray (80 Mass.), 203.

<sup>44</sup> See secs. 35, 36, herein; *Union Mut. F. Ins. Co. v. Keyser*, 32 N. H. 313; 64 Am. Dec. 377; *Morrison v. Wisconsin Odd Fellows' etc. Co.*, 59 Wis. 169; *Peck v. New London Co. Mut. F. Ins. Co.*, 22 Conn. 575; *Splawn v. Chew*, 60 Tex. 532; *Cumberland Valley etc. Ins. Co. v.*

ference between agents of stock and mutual companies,<sup>45</sup> and it would seem, in so far as their acts within the apparent scope of their authority are concerned, that there can be no difference. If an agent of a stock company can waive express provisions of the policy, where his authority is broad enough, why should a contract with a mutual company be peculiarly protected? The by-laws, though a part of a member's contract, ought not to impose greater obligations than the express stipulations of a policy in a stock company, and if the power to waive a by-law, which is neither mandatory nor of the essence of the contract, rests in the company, why not, then, in an agent having the requisite authority? Certainly, if the company is empowered to vest discretionary powers in its agents in such matters, it cannot be said to abrogate the principle of mutuality. Thus in a New York case<sup>46</sup> the court declares that it is the duty of incorporated companies to see to it at their peril that their officers and agents understand their powers and duties, and that they do not habitually transcend such powers. We believe the above expressions are in accord with the conclusions of other writers and with the tendency of opinion at the present time.<sup>47</sup>

**§ 395. Who is General Agent.**—A distinction is made under the law of agency, as to the extent of their authority, between general and special agents.<sup>48</sup> This distinction Evans, in

Schell, 29 Pa. St. 31. The courts of Massachusetts distinguish as to these by-laws which are not of the essence of the contract: *Brewer v. Chelsea etc. Ins. Co.*, 14 Gray (80 Mass.), 209; *Priest v. Citizens' Mut. F. Ins. Co.*, 3 Allen (85 Mass.), 602.

<sup>45</sup> *Kausal v. Minnesota Farmers' Mut. F. Ins. Assn.*, 31 Minn. 17; 47 Am. Rep. 776.

<sup>46</sup> *Conover v. Mutual Ins. Co.*, 1 Comst. (N. Y.), 200.

<sup>47</sup> See 1 May on Insurance, 3d ed., sec. 126, p. 220, secs. 127, 139, 140, 145-49; Bacon on Benefit Societies and Life Insurance, ed. 1888, secs. 147, 151, 156-58, 171, 307, 426; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Peck v. New London Mut. F. Ins. Co.*, 22 Conn. 575.

<sup>48</sup> *Crugan v. Smith*, 41 Ind. 288; *Lattorous v. Farmers' M. & F. Ins. Co.*, 3 Houst. (Del.) 4040. See, also, 2 Wood on Fire Insurance, 2d ed. 873, sec. 421; Richards on Insurance, ed. 1892, p. 21, sec. 17 et seq. p. 95 sec. 93, p. 101 sec. 95. "There seems to be no very well-defined distinction between the powers of general agents, local agents, and subagents": 1 May on Insurance, 3d ed., sec. 126, p. 221.

his work on Agency, asserts to be of little or no practical value, and this is true, so far at least as regards the principal and third parties, since the question in case of dispute as to the agent's powers does not rest alone upon whether the authority is general or special, but inquiry is necessitated as to whether the agent's acts are within the scope of his real or apparent authority.<sup>49</sup> And this is especially applicable to insurance agents. We will consider, however, some of the decisions relating to general agents. An agent who is required to write policies, and is authorized to settle the terms of insurance and investigate losses, is a general agent, with authority to waive preliminary proofs of loss.<sup>50</sup> So agents are general agents where they fully represent the company within a certain district, are authorized to solicit insurance, receive moneys and premiums, issue and renew policies, appoint subagents, and adjust losses;<sup>51</sup> and an agent who has power within a certain territory to receive proposals of insurance, to fix rates of premium, receive moneys, countersign, issue, and renew policies of insurance, is a general agent.<sup>52</sup> Where one writes up and delivers a policy to the assured indorsed with his name thereon as "agent," he is a general agent, with authority to waive conditions in the policy.<sup>53</sup> So one is a general agent where he has control at times of the local agencies in the state, approves risks, attends to the details of the company's business, and at the request of the secretary examines the same, signs his name to letters, and uses letter-heads with his name thereon as general agent.<sup>54</sup> A person employed to negotiate and complete contracts of insurance, accept risks, receive premiums and premium notes, and renew

<sup>49</sup> Ewell's *Evans on Agency*, p. 21. See *Id.*, p. 134, side p. 101, et seq. See, also, *Thompson on Corporations*, ed. 1895-96, secs. 4878, 4879.

<sup>50</sup> *Travelers' Ins. Co. v. Harvey*, 82 Va. 949; 5 S. E. Rep. 553. See *Industrial etc. Assn.*, 131 Ind. 68, 73 (held general agent without regard to extent of territory or scope of powers).

<sup>51</sup> *Insurance Co. v. Gray*, 43 Kan. 497, 503, 504, per Johnston, J.

<sup>52</sup> *Phoenix Ins. Co. v. Munger*, 49 Kan. 178; 30 Pac. Rep. 120.

<sup>53</sup> *Millville F. Ins. Co. v. Mechanics' etc. Assn.*, 43 N. J. L. 852.

<sup>54</sup> *King v. Council Bluffs Ins. Co.*, 72 Iowa, 310, 315; 33 N. W. Rep. 690.

policies, is a general agent.<sup>55</sup> An agent authorized to issue policies, to fix rates and premiums, and to countersign, renew, and sign the transfer of policies in a certain locality is a general agent within that district,<sup>56</sup> and as such agent he may take risks outside of the locality to which his agency is limited, where the insured has no knowledge of such limitation.<sup>57</sup> So an agent intrusted with blank policies and renewal receipts has impliedly a general authority to do everything necessary to their issue.<sup>58</sup> So a party is a general agent who acts in a certain locality under a written commission authorizing him to receive proposals for insurance, countersign, issue, and renew policies, and consent to the transfer of the same, although he is subject to the instructions of the company's officers and to the rules and regulations of the company;<sup>59</sup> and the local agents of a foreign insurance company appointed by a general agent, located without the state, are general agents, and may bind the company by acts within the scope of their general authority, though in violation of limitations thereupon not brought home to the knowledge of the party dealing with them.<sup>60</sup> So a local agent of a foreign company is a general agent where he is empowered to effect contracts of insurance, fix rates of premiums, consent to change in and increase of risks, and generally to exercise supervision over the property covered by the company's policies issued through him. As such agent he may, in the absence of known limitations on his authority, dispense with con-

<sup>55</sup> *South Bend etc. Co. v. Dakota F. & M. Ins. Co.*, 2 S. Dak. 17; 52 N. W. Rep. 868; affirming s. c., 48 N. W. Rep. 310; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656; *Pitney v. Glens Falls Ins. Co.*, 61 Barb. (N. Y.) 335; 65 N. Y. 6, 21; *Hartford F. Ins. Co. v. Orr*, 56 Ill. App. 629.

<sup>56</sup> *West v. Insurance Co.*, 10 Utah, 448, per Borch. J.

<sup>57</sup> *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18.

<sup>58</sup> *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292. See *Little v. Phoenix Ins. Co.*, 123 Mass. 380, 25 Am. Rep. 96, where it was held that agent was general agent with authority to settle loss and waive formal preliminary proofs.

<sup>59</sup> *Howard Ins. Co. v. Owen*, 94 Ky. 197; 13 Ky. Law Rep. 237; *Phoenix Ins. Co. v. Munger*, 49 Kan. 178; 30 Pac. Rep. 120.

<sup>60</sup> *Miller v. Phoenix Ins. Co.*, 27 Iowa, 203; 1 Am. Rep. 262.

ditions and waive forfeitures.<sup>61</sup> Again, a person is a general agent who has charge of the company's business for a state, and who acts under general instructions to such agents and without special limitations upon his authority.<sup>62</sup> An agent authorized to make contracts of insurance, collect premiums, and issue and renew policies, and to that end is furnished with printed forms of policies signed in blank by the president and secretary, to enable him without conference with them to countersign and issue policies, is the general agent of the company.<sup>63</sup> But an agent of a foreign life insurance company who has authority to solicit risks, take applications, issue and deliver policies, receive premiums, and deliver receipts, is not necessarily a general agent in point of law, and as such empowered to waive payment of premiums;<sup>64</sup> nor is one a general agent who has merely authority to work a certain territory and to receive applications under instructions from the company.<sup>65</sup>

**§ 396. Power of Agents to Delegate Authority.**—Authority is either original or derivative. Whenever a person possesses the power in himself of his own right to do an act, he may delegate that power to another, for, in general, whatever a man can do by himself he can do by another, provided, of course, that the act is not illegal.<sup>66</sup> This consideration of importance in connection with the right of agents of insurance companies to waive conditions of a policy, since in case of insurance corporations their powers are limited by charter.<sup>67</sup> If the authority is derivative, as where a person is appointed to act as the agent of another, and no express power to delegate ex-

<sup>61</sup> *Viele v. Germania Ins. Co.*, 28 Iowa, 9; 96 Am. Dec. 83, and note, 112.

<sup>62</sup> *Southern Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.) 606; 24 Am. Rep. 344.

<sup>63</sup> *Machine Co. v. Insurance Co.*, 50 Ohio St. 558; 35 N. E. Rep. 10, 60, per Williams, J.

<sup>64</sup> *Mesereau v. Phoenix Ins. Co.*, 68 N. Y. 274.

<sup>65</sup> *Martin v. Farmers' Ins. Co. of Cedar Rapids*, 84 Iowa, 516; 51 N. W. Rep. 29.

<sup>66</sup> See Ewell's *Evans on Agency*, ed. 1870, c. vi, p. 47, side p. 35, et seq., for rule and exceptions thereto.

<sup>67</sup> But see secs. 35, 36, herein.

ists, the maxim, "Delegatus non potest delegare," applies as a general rule, since the authority of the agent is exclusively personal,<sup>68</sup> upon the ground that the principal may rely upon the experience, skill, and integrity of the particular person whom he has appointed as his agent. There are, however, important exceptions to the rule; noticeably, in cases where usage or custom or the particular nature of the employment warrant an implied authority to delegate. So in cases where the power delegated does not involve the exercise of discretion, or in case the employment of subagents is necessitated to carry out the instructions of the principal, or where the act of substitution is ratified by the principal.<sup>69</sup> The following authorities will illustrate the above points: Thus, where the authority conferred on the agent is such as to require the exercise of skill and discretion, and no power of substitution is given, the authority is exclusively personal, and the principal would not be bound by the act of a subagent.<sup>70</sup> So an adjuster selected because of his special ability, skill, and fitness cannot delegate his authority by the appointment of a subadjuster without the company ratifies the act.<sup>71</sup> So an agent in whom is vested discretionary power cannot delegate his authority except under an express grant of authority.<sup>72</sup> Therefore, a general agent, whose power in issuing policies of insurance calls for the exercise of discretion, cannot delegate the same to another,<sup>73</sup> nor can an agent delegate the power to countersign policies where he is agent to issue policies which are not to be valid till countersigned.<sup>74</sup> But an act of the agent's clerk in signing the policy is a mere minister-

<sup>68</sup> See *Smith v. Soublett*, 28 Tex. 163; *Bocock v. Pavey*, 8 Ohio St. 270; *Ewell's Evans on Agency*, ed. 1879, c. vi, p. 51, sec. 2, et seq.; *Story on Agency*, 2d ed., secs. 13-34 a.

<sup>69</sup> See *Ewell's Evans on Agency*, ed. 1879, 57.

<sup>70</sup> See remarks of the court in *Brown v. Railway Pass. Assur. Co.*, 45 Mo. 221.

<sup>71</sup> *Ruthven v. American F. Ins. Co.*, (Iowa, 1894), 60 N. W. Rep. 662.

<sup>72</sup> *Farmers' Fire Ins. Co. v. Chase*, 56 N. H. 341. But see *Morawetz on Private Corporations*, ed. 1882, sec. 249.

<sup>73</sup> *McClure v. Mississippi Valley Ins. Co.*, 4 Mo. App. 148.

<sup>74</sup> *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400. See *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198, 203.



ial act when done in pursuance of the slip which the agent himself had signed under a power of attorney, the act of the clerk being held not to require the exercise of any discretion or judgment. Another factor entered into this case which strengthened the ruling, and that was, that the evidence showed no adoption of the policy by the underwriter.<sup>75</sup> An agent, without express authority to appoint a subagent, cannot make another an agent of the company by agreeing, without the company's knowledge, to divide commissions with him on insurance procured.<sup>77</sup> But a general agent of a life insurance company, with authority to employ subagents, may make a contract with a subagent as to salary, which will bind the company, and in such case it, and not the agent, is responsible therefor;<sup>77</sup> and an agent may employ a subagent to procure applications which he himself acts upon and forwards to the company.<sup>78</sup> So the acts of a subagent employed by a duly authorized agent to solicit insurance are as binding as those of the agent himself,<sup>79</sup> and the general agent of a foreign insurance company is presumed to have power to appoint subagents.<sup>80</sup> So a general insurance agent authorized for several counties to receive applications, fix premium rates, receive money, countersign, issue, renew, and consent to the transfer of policies does not exceed his authority by appointing a subagent to receive applications and forward them to him,<sup>81</sup> and it may be generally stated that an agent with general powers, such as the authority to make contracts, deliver policies, and collect premiums, may appoint subagents, clerks, surveyors, and other subordinates to exercise similar powers.<sup>82</sup> An agent of an accident insurance company, with absolute

<sup>75</sup> *Mason v. Joseph*, 1 Smith (N. Y.), 406. One member of a partnership who are the agents of an insurance company has all the powers of the firm: *Kennebec v. Augusta etc. Co.*, 6 Gray (72 Mass.), 204.

<sup>76</sup> *Phoenix Ins. Co. v. Spies* (Ky.), 8 S. W. Rep. 453.

<sup>77</sup> *Cotton States Life Ins. Co. v. Mallard*, 57 Ga. 64.

<sup>78</sup> *Rossiter v. Trafalgar Life Assur. Assn.*, 27 Beav. 377.

<sup>79</sup> *McGonigle v. Aurora F. Ins. Co.*, 168 Pa. St. 1; 31 Atl. Rep. 868.

<sup>80</sup> *Keeney v. Amazon Ins. Co.*, 36 Hun (N. Y.), 66.

<sup>81</sup> *Krumm v. Jefferson Fire Ins. Co.*, 40 Ohio St. 225.

<sup>82</sup> *Mayer v. Mutual L. Ins. Co.*, 38 Iowa, 304; 18 Am. Rep. 34; *Ecclectic L. Ins. Co. v. Fahrenkrug*, 68 Ill. 463.

power to effect insurances, may appoint a subagent where the skill and discretion are not required and the tickets are made out and signed at the company's offices and sent to the various agencies to be sold indifferently to all who apply.<sup>83</sup> If an insurance company specially authorizes its agent to cancel a policy, he cannot delegate such power, but where all necessary acts to effect a cancellation have been performed by him, he is not personally obligated to deliver the notice and tender the premium to the insured; these acts may be performed by another acting for such agent.<sup>84</sup> A local agent may appoint a subagent with the knowledge of the company,<sup>85</sup> and if one acts as agent for the original agent, with the knowledge and consent of the company, the latter is bound.<sup>86</sup> It is held that if the general agent employs a subagent to procure risks, the company is bound, unless the subagent knew the general agent to be without authority to employ him.<sup>87</sup> If the power of substitution is exercised by an agent acting without full power, and the act is ratified by the principal, the agent is not liable for loss consequent upon such substitution.<sup>88</sup> It is another general rule, applicable as well to a contract of insurance as to any other, that the original agent is not responsible for the acts of his subagent where his employment is expressly or impliedly authorized, whether by usage or express authority to substitute, or by instructions of the principal or otherwise, unless the original agent was guilty of fraud or gross negligence in the appointment or substitution, or unless the subagent's damaging acts and omissions were co-operated in by him. By force of the authority to substitute, a privity is established between the latter and the principal, and the responsibility is directly to him.<sup>89</sup> This

<sup>83</sup> *Brown v. Railway Pass. Assur. Co.*, 45 Mo. 221.

<sup>84</sup> *Runkle v. Citizens' Ins. Co. etc.*, 6 Fed. Rep. 143, 149.

<sup>85</sup> *Golt v. National Prot. Ins. Co.*, 25 Barb. (N. Y.) 189.

<sup>86</sup> *Van Scholek v. Niagara Fire Ins. Co.*, 68 N. Y. 434.

<sup>87</sup> *Equitable Life Assur. Co. v. Brobst*, 18 Neb. 526.

<sup>88</sup> *Smith v. Cologan*, 2 Term Rep. 188, n.

<sup>89</sup> 2 Duer on Insurance, ed. 1810, sec. 4, p. 187, citing *Story on Agency*, 2d ed., secs. 201, 217-33. See generally *Mechem on Agency*, ed. 1889, secs. 197, 728; *Strong v. Stewart*, 9 Helsk. (56 Tenn.) 137; *Louisville etc. R. R. Co. v. Blair*, 4 Baxt. (63 Tenn.) 407; *Equitable Life Ins. Co. v. Brobst*, 18 Neb. 526; *Langdon v. Union M. F. Ins.*

general rule would seem, perhaps, to be more broadly stated by the court in a New York case, where it is said, in substance, that the ordinary course of business frequently necessitates the employment of clerks by the agents to assist them. In agencies doing a large business, it is presumed that clerks may be employed to attend to the details of the business. An agent can authorize the clerk to contract risks, deliver policies, collect premiums, and other matters of like import, and the act of the clerk in such matters binds the company, and the maxim, "*Delegatus non potest delegare*," does not apply in such cases,<sup>90</sup> but from an examination of the case and an application of these words to the facts, it might be reasonably assumed that the court did not evidently intend to enlarge the general rule, since the acts of the subagent were in accordance with a general course of dealing sanctioned by the company. He had procured policies and renewal certificates from the company, and frequently delivered them to the insured waiving prepayment of the premiums.<sup>91</sup> An authority to employ a subagent may impliedly arise from the character of the agency, or where the instructions are such as to require the appointment of a subagent to execute them, or where it is indispensable to accomplish the purpose of the agency;<sup>92</sup> the principle underlying this rule being analogous to the rule that an agent may employ the usual and necessary means to execute his authority,<sup>93</sup> and there is no reason why the rule should not be equally applicable to agents of insurance companies as well as to those of other companies.

Co., 14 Fed. Rep. 272; *Mound City Life Ins. Co. v. Heath*, 49 Ala. 529; *Mayer v. Mutual L. Ins. Co.*, 38 Iowa, 304; 18 Am. Rep. 34; *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Kinney v. Insurance Co.*, 36 Hun (N. Y.), 66. But see *Waldman v. N. B. & M. Ins. Co.*, 91 Ala. 170; 8 S. Rep. 666.

<sup>90</sup> *Bodine v. Insurance Co.*, 51 N. Y. 117, 123, per Earl, J.; 10 Am. Rep. 566, 571.

<sup>91</sup> See *Kinney v. Insurance Co.*, 36 Hun (N. Y.), 66.

<sup>92</sup> *Ewell's Evans on Agency*, p. 59, side p. 44; *Morawetz on Private Corporations*, ed. 1882, sec. 248.

<sup>93</sup> See *Owen v. Brockschmidt*, 54 Mo. 285; *Merrick v. Wagner*, 44 Ill. 266; *Strong v. Stewart*, 9 Heisk. (56 Tenn.) 147, per Sneed, J.; *Birdenbecker v. Lowell*, 32 Barb. (N. Y.) 9, 17; *Ewell's Evans on Agency*, ed. 1879, 59, \*44; 1 *Walt's Actions and Defenses*, 221, sec. 2.

**§ 397. Officers of Insurance Corporations and Associations and their Powers.**—We have seen that corporations are presumed to act through agents,<sup>94</sup> and that in the absence of charter provisions therefor there is an implied consent on the part of those becoming members of mutual companies that the necessary officers and agents shall be employed.<sup>95</sup> It is a settled, general rule of agency that officers of a corporation or association are special agents, whose powers are limited and prescribed by the charter or articles of association and by-laws, and that persons dealing with them are chargeable with notice of these limitations.<sup>96</sup> But the acts of the officers of a society within the lawful scope of his authority are binding on the company;<sup>97</sup> for an insurance company must act by its officers, and their acts and statements as such, done and made in the discharge of their duty in that capacity and in relation thereto, are evidence against the company.<sup>98</sup> Although an agent's powers are limited by the by-laws, yet if such agent belongs to a particular class, the functions and duties of which are settled by general custom, such agent may be legally assumed to possess such powers as are usually exercised by the class within the category of which his agency falls.<sup>99</sup> But the officers and directors may not ratify acts of the president which they themselves could not have originally done.<sup>100</sup> It is held that the officers of mutual insurance companies have no authority to waive the by-laws and provisions adopted by the members of the company for their mutual protection.<sup>101</sup> But where the

<sup>94</sup> Sec. 309, *herein*; Angell & Ames on Corporations, 9th ed., sec. 276, et seq.

<sup>95</sup> *Protection Life Ins. Co. v. Foote*, 79 Ill. 361; sec. 386, *herein*.

<sup>96</sup> *Alexander v. Cauldwell*, 83 N. Y. 480; *City Fire Ins. Co. v. Car-rugi*, 41 Ga. 680; *Silliman v. Fredericksburg etc. R. R. Co.*, 27 Gratt. (Va.) 119; 2 Morawetz on Corporations, 2d ed., sec. 591; Angell & Ames on Corporations, 9th ed., sec. 291, et seq.

<sup>97</sup> *Hackney v. Alleghany Co. Mut. Ins. Co.*, 4 Pa. St. 187.

<sup>98</sup> *First Bapt. Church v. Brooklyn Fire Ins. Co.*, 18 Barb. (N. Y.) 69; *Muhlman v. National Ins. Co.*, 6 W. Va. 508.

<sup>99</sup> See *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. (U. S.) 318; *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46.

<sup>100</sup> *Crimm's Appeal*, 66 Pa. St. 474.

<sup>101</sup> *Mulvey v. Shawmut etc. Ins. Co.*, 4 Allen (Mass.), 116; 81 Am.

waiver is of some matter which relates rather to the remedy than to the substance of the contract, the officers of the company have power to waive the by-laws,<sup>102</sup> and where the affairs of a mutual company are managed by a board of directors, who select all the officers of the company, such officers have power to waive defects and ratify invalid policies of insurance.<sup>103</sup> But the officers cannot waive a condition of the policy in a mutual company which provides that in case of any change in the facts or in the condition of the premises the policy should be void, except upon written notice to and written consent of the directors signed by the secretary, and the payment of an additional premium or deposit.<sup>104</sup> So where a by-law of a mutual company provides that consent to other insurance may be given only by the president and secretary, it is error to charge the jury that it may be given by a director or the secretary.<sup>105</sup> The officers of the company may waive a breach of condition of an insurance policy by neglecting to cancel the policy and thereafter collecting an assessment with knowledge of the facts.<sup>106</sup> So the company may waive its right to have the values stated in detail by its officers accepting an aggregate valuation of all the property covered by the application;<sup>107</sup> and if officers of a company, with knowledge of the actual condition of the title of the applicant, choose to accept the risk, the policy is not voided because the interest of the assured is other than that of an entire, unconditional, and sole ownership as re-

Dec. 689; *Baxter v. Chelsea Mut. F. Ins. Co.*, 1 Allen (Mass.), 294; 79 Am. Dec. 730, and note, 733; *Behler v. German etc. Ins. Co.*, 68 Ind. 354; *Wilson v. Conway M. F. Ins. Co.*, 4 R. I. 141; *Lyon v. Supreme Assembly*, 153 Mass. 83; 26 N. E. Rep. 236; *Westchester etc. Ins. Co. v. Earle*, 33 Mich. 150.

<sup>102</sup> *Brewer v. Chelsea Ins. Co.*, 14 Gray (80 Mass.), 209. See secs. 35, 36, 407, herein.

<sup>103</sup> *Pratt v. Dwelling-house Mut. F. Ins. Co.* (N. Y. 1892), 29 N. E. Rep. 117; 41 N. Y. 303.

<sup>104</sup> *Evans v. Tremontain etc. Ins. Co.*, 9 Allen (Mass.), 329.

<sup>105</sup> *Stark etc. Ins. Co. v. Hurd*, 19 Ohio, 149. See secs. 401, 404, herein.

<sup>106</sup> *Osterloh v. New Denmark Ins. Co.*, 60 Wis. 126. *Examine Ware v. Millville F. Ins. Co.*, 45 N. J. L. 177.

<sup>107</sup> *Residence Fire Ins. Co. v. Hannawold*, 37 Mich. 103.

quired by the policy.<sup>108</sup> So parol evidence is admissible to show that a misdescription contained in the policy arose from the mistake of the officer of the company, to whom the building was accurately described.<sup>109</sup> But an officer's knowledge acquired by rumor or in his individual capacity does not operate as constructive notice to the company.<sup>110</sup> And where the question was whether a policy had been forfeited for breach of condition as to the building being unoccupied, it was held immaterial that the officers knew of the vacancy.<sup>111</sup> And where the president and director of the company go at once upon the ground after the fire, for the purpose of examining into the circumstances, this is sufficient evidence of notice, although the policy provides that notice of loss be given forthwith.<sup>112</sup> So the company waives the right to demand formal proofs of loss where the officer to whom such proofs should be made visits the ground subsequent to loss, and agrees with the insured as to the valuation of the property destroyed;<sup>113</sup> but if the personal examination be made by the officer subsequent to the thirty days' limit it does not constitute a part of the proofs,<sup>114</sup> although the agreement of an officer of the company and the insured to adjust a loss does not necessarily raise an estoppel against the company to claim a forfeiture for breach of conditions.<sup>115</sup> It is a sufficient compliance with a condition requiring that preliminary proofs of loss be delivered at the office, if there be an actual delivery there to any officer in charge; such officer may also waive further proofs than those submitted.<sup>116</sup> It is held in California<sup>117</sup> that the officers of an insurance company had no power to bind the company for the payment of the premium on a policy by acting as agents of an applicant in procuring insurance from another company.

<sup>108</sup> *Union Ins. Co. v. Chipp*, 93 Ill. 96.

<sup>109</sup> *Mollere v. Penn Ins. Co.*, 5 Rawle (Pa.), 342; 28 Am. Dec. 675.

<sup>110</sup> *Keenan v. Dubuque etc. Ins. Co.*, 13 Iowa, 375.

<sup>111</sup> *Hermann v. Adriatic Fire Ins. Co.*, 85 N. Y. 162.

<sup>112</sup> *Ronmage v. Insurance Co.*, 13 N. J. L. (1 Green) 110.

<sup>113</sup> *Susquehanna Mut. F. Ins. Co. v. States*, 102 Pa. St. 529.

<sup>114</sup> *Winneshek Ins. Co. v. Schneller*, 60 Ill. 465.

<sup>115</sup> *Colonius v. Hibernia Fire Ins. Co.*, 3 Mo. App. 56.

<sup>116</sup> *Edgerly v. Farmers' Ins. Co.*, 48 Iowa, 644.

<sup>117</sup> *Hutchinson v. State Invest. & Ins. Co.*, 53 Cal. 622.

**§ 398. Powers of Officers of Mutual Benefit Societies.** Committees and officers of mutual benefit societies, in so far as the management of the affairs of such organization devolve upon them, are clothed to a certain extent with the powers of general agents, while in other respects they occupy no other footing than that of agents with special authority, defined and limited largely by the laws governing the body for which they act. They resemble, in many particulars, directors and officers of corporations, so far as their authority is concerned. But the rule of limitation of their powers is flexible to the extent that the authority which they are held out to the world to possess cannot be held to yield to restrictions and limitations which are unknown to the parties with whom they deal. Their principals are bound by their ostensible authority, subject to those limitations upon the power of the principal and upon their own powers, which are in the charter or constitution or by-laws,<sup>118</sup> and we see no reason why they should not be bound, subject to the above limitations, by the same rules as like agents in other companies.

**§ 399. Powers of President.**—In insurance companies a wide discretion is usually vested in the president, and he, as well as the secretary, may generally, in all matters relating to the transaction of the company's business at its office, bind the company by acts which are within the legitimate scope of the business and of his ostensible authority.<sup>119</sup> The president of an insurance company may indorse its notes although the charter requires that all contracts and other agreements made by the

<sup>118</sup> See Bacon's *Benefit Societies and Life Insurance*, ed. 1888, sec. 133, 134, 145; Niblack on *Mutual Benefit Societies*, c. vi, sec. 311.

<sup>119</sup> See *Dillebar v. Knickerbocker L. Ins. Co.*, 76 N. Y. 567; *Cotton States Ins. Co. v. Edwards*, 74 Ga. 220; *Smith v. Smith*, 62 Ill. 493, per Walker, J.; *Bacon v. Mississippi Ins. Co.*, 31 Miss. 116; *St. Nicholas Ins. Co. v. Howe*, 7 Bosw. (N. Y.) 450. See, generally, as to powers of president and other officers and agents of corporations, *Sparks v. Dispatch Transfer Co.*, 104 Mo. 531; 24 Am. St. Rep. 351; *Ceeder v. London etc. L. Co.*, 86 Mich. 541; 24 Am. St. Rep. 134; *Sherman etc. Co. v. Swigart*, 43 Kan. 292; 19 Am. St. Rep. 137; *Thompson on Corporations*, ed. 1895-96, secs. 4613 et seq., 4697 et seq., 4716 et seq., 4846 et seq., 4873 et seq.

company in the necessary course of business shall be in writing or in print, and signed by the president and secretary, or by such other officer or officers as the directors may appoint therefor, and in such case it is not necessary to prove a formal vote of the directors.<sup>120</sup> So if the president is authorized to adjust and pay losses, he may indorse notes and deliver them;<sup>121</sup> and an ex-president acting as president may by indorsement pass title to a promissory note payable to the company, especially where the company accepts the benefit thereof by converting the proceeds to its use.<sup>122</sup> The president may also validly transfer a premium note in payment of a loss where the act is in the ordinary course of business, and in conformity with a usage and a standing by-law of the company, although the charter provides that the corporate business shall be transacted by trustees and agents whom they may appoint, and although the act was not expressly authorized by the board of trustees.<sup>123</sup> But it is held that if the president is not authorized by the charter or by-laws to indorse and negotiate the company's notes, that he has no authority as such officer to do so,<sup>124</sup> and if he gives a promissory note as president of the company, it is not the company's note, but his own;<sup>125</sup> and if he issues forged certificates of stock for an individual loan the company is not bound.<sup>126</sup> Where the general supervision of the affairs of a company are vested under its by-laws in the president, and a policy upon a

<sup>120</sup> *Topping v. Beckford*, 4 Allen (86 Mass.), 120.

<sup>121</sup> *Baker v. Cotter*, 45 Me. 236. See *Bank of Attica v. Pottier etc. Co.*, 1 N. Y. 483; *Fifth Nat. Bank v. Navarsa etc. Co.*, 119 N. Y. 256.

<sup>122</sup> *Patten v. Moses*, 49 Me. 255. See *Tuscaloosa etc. Co. v. Perry*, (Ala.) 4 S. Rep. 635.

<sup>123</sup> *Howland v. Myer*, 3 Comst. (N. Y.) 290; affirming *Aspinwall v. Meyer*, 2 Sand. (N. Y.) 180. See in connection with this case the statute of New York (1 Rev. Stat. 722, sec. 8), in regard to act to prevent the insolvency of moneyed corporations, it being held that a transfer of a note for more than one thousand dollars, without a resolution of the board of trustees, was not in violation of that act, as the charter was granted subsequently to the passage of the act.

<sup>124</sup> *Marine Bank etc. v. Clements*, 3 Bosw. (N. Y.) 600.

<sup>125</sup> *Barker v. Mechanics' Fire Ins. Co.*, 3 Wend. (N. Y.) 94; 20 Am. Dec. 664. But see as to same principle, *Thompson v. Bell*, 10 Ex. 10; 23 L. J. Ex. 321.

<sup>126</sup> *Manhattan L. Ins. Co. v. F. etc. R. Co.*, 46 N. Y. 130.



special risk, signed, as required by the by-laws, by the president and secretary, is issued, and such officers have full knowledge of all facts material to the risk, the policy is valid and enforceable, although the rules of the company provide that such special risks shall be approved by the executive committee and three directors before the policy is issued, and the rule is not complied with.<sup>127</sup> The president has authority to employ counsel.<sup>128</sup> He may waive a forfeiture for nonpayment of premiums, as in case the insured relies upon his statements that the company would give him whatever accommodation was necessary, and the company thereafter, for several years, receives overdue premiums.<sup>129</sup> So it is held that he may make a contract with a special agent, whose life is insured by the company, to charge the premiums, although a by-law provides that all premiums shall be paid in cash, and this although the agent was indebted to the company when such agreement was made by him with the president.<sup>130</sup> He may waive a deviation from the risk where such act is in accordance with a uniform practice of the company and there is an extra compensation paid therefor. In such case an indorsement written across the policy without any new signature and recorded by the secretary is sufficient.<sup>131</sup> And it is held that knowledge of the president is knowledge of the company.<sup>132</sup> So the president alone, or with concurrence of any director, may settle a loss where the charter and by-laws give him specifically such authority, although its charter and by-laws also provide that the company's affairs shall be managed by a board of directors, who may appoint such other officers as are necessary for the transaction of its business.<sup>133</sup> Where the president is held out as having authority to make oral contracts for insurance, third persons are not affected by secret limitations on his authority.<sup>134</sup> But where

<sup>127</sup> *Merchants' etc. Ins. Co. v. Curran*, 45 Mo. 142; 100 Am. Dec. 361.

<sup>128</sup> *Oakley v. Workingman's B. Soc.*, 2 Hilt. 487.

<sup>129</sup> *Dillebar v. Knickerbocker Life Ins. Co.*, 7 Daly (N. Y.), 540.

<sup>130</sup> *Missouri Valley Life Ins. Co. v. Dunklee*, 16 Kan. 158.

<sup>131</sup> *Warren v. Ocean Ins. Co.*, 16 Me. 439; 33 Am. Dec. 674.

<sup>132</sup> *Pomeroy v. Rocky Mountain etc. Ins. Co.*, 9 Col. 295; 59 Am. Rep. 144.

<sup>133</sup> *Mercer County Mut. Ins. Co. v. Stranahan*, 104 Pa. St. 246.

<sup>134</sup> *Commercial Mut. M. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. (U. S.) 318; 2 Curt. (C. C.) 524.

the by-laws require the written consent of the president to other insurance, and the by-laws are attached to the policy, it is held that in such case his oral consent is insufficient. It was also provided in the policy in this case that the by-laws could not be altered except by a vote of two-thirds of the stockholders or directors.<sup>135</sup> And where the act incorporating an insurance company provides that no losses shall be settled or paid without the approbation of at least four of the directors, with the president or assistants, or a plurality of them, the acceptance of an abandonment by the president and assistants alone will not be binding on the company.<sup>136</sup> So it is held that the president of a mutual company has no authority to waive conditions of an insurance policy dependent upon the by-laws, and make a different contract from that authorized by such by-laws.<sup>137</sup> It is also held that he has no power to waive or dispense with any of the conditions of the policy, unless authorized thereto by the charter or by-laws or the board of directors;<sup>138</sup> that he cannot waive full preliminary proofs of loss;<sup>139</sup> that he has no power to waive a by-law requiring prepayment of the premium as a condition precedent to the validity of the policy.<sup>140</sup> In this last case it was also held that the company was not bound by the representations of the president to a mortgagee that the mortgagor had procured insurance upon the mortgaged property, payable to the mortgagee, when in fact the policy had not been delivered, because of the failure of the mortgagor to pay the premium. And the sufficiency of preliminary proofs of loss is not admitted, nor further proof waived, by the statement of the president that "the policy will show," on inquiry being made of him, as to "what further preliminary proof of

<sup>135</sup> *Hale v. Mechanics' Mut. F. Ins. Co.*, 6 Gray (Mass.) 169; 66 Am. Dec. 410; *Worcester Bank v. Hartford F. Ins. Co.*, 11 Cush. (Mass.) 265; 59 Am. Dec. 145.

<sup>136</sup> *Bentley v. Marine Ins. Co.*, 2 Johns. (N. Y.) 109; 3 Am. Dec. 401.

<sup>137</sup> *Priest v. Citizens' Ins. Co.*, 3 Allen (Mass.), 602; *Brewer v. Chelsea F. Ins. Co.*, 14 Gray (Mass.), 203. See secs. 35, 36, herein.

<sup>138</sup> *McEvers v. Lawrence*, 1 Hoffm. 172.

<sup>139</sup> *Dawes v. North River Ins. Co.*, 7 Cow. (N. Y.) 462.

<sup>140</sup> *Baxter v. Chelsea Mut. F. Ins. Co.*, 1 Allen (Mass.), 294; 79 Am. Dec. 730.

loss was required.”<sup>141</sup> And where such notice of loss is not given within the time required by the by-laws, no waiver arises from the remark of the president, made seventeen months after the loss, that the company knew when the fire occurred that it was its loss, that it would do what was right, and was not surprised that they were not notified.<sup>142</sup> But the president and secretary may, by a statement made in the course of their duties after the loss and when notice of it is received, bind the company, as in case they admit that they had agreed to insure the property or keep it insured, such statement binds the company as much as a certificate of renewal or of payment of the premium.<sup>143</sup>

**§ 400. Powers of Vice-President.**—The vice-president of a corporation may, in certain cases, such as the absence of the president or a vacancy in the office, act in his place and stead, and perform the duties which would have devolved upon the president.<sup>144</sup> Where the title of the assured was not truly stated, but the existence of a mortgage was known to the agent and to the vice-president of the insurance company, it was held that there was no such concealment of the true title as to invalidate the policy, notwithstanding a provision therein that it should be void if the interest of the assured be not stated in the policy where it was not absolute.<sup>145</sup>

**§ 401. Powers of Secretary.**—Where the powers and duties of the secretary are not prescribed by the charter or by-laws, the presumption arises that he possesses and may exercise all such powers as the duties of the office reasonably and neces-

<sup>141</sup> *Spring Garden etc. Ins. Co. v. Evans*, 9 Md. 1; 66 Am. Dec. 308.

<sup>142</sup> *Smith v. Haverhill Mut. F. Ins. Co.*, 1 Allen (Mass.), 297; 79 Am. Dec. 733.

<sup>143</sup> *First Bapt. Church v. Brooklyn F. Ins. Co.*, 18 Barb. (N. Y.) 69.

<sup>144</sup> *Smith v. Smith*, 62 Ill. 493, per Walker, J.; *Mitchell v. Deeds*, 49 Ill. 417, 424; 95 Am. Dec. 621; cited in *Morawetz on Private Corporations*, ed. 1882, sec. 252.

<sup>145</sup> *Home Mut. Fire Ins. Co. v. Garfield*, 60 Ill. 124; 14 Am. Rep. 27. As to the power of the vice-president to fill vacancies in a committee, see *Burton v. St. George's Society*, 28 Mich. 161.

sarily require.<sup>146</sup> Such officer of an insurance company is its official agent to carry into effect the votes and directions of the managing body, unless the contrary appears.<sup>147</sup> Where it is the duty of the secretary of a mutual insurance company, under its by-laws, to keep records of the doings of the directors and of the company, and to receive notice of loss, his admissions made in letters addressed to the assured are admissible in evidence in a suit upon the policy where they acknowledge notice of loss or refer to the acts of the directors in connection therewith.<sup>148</sup> So the secretary's letter to the assured constitutes a waiver of defects in the proofs of loss, when written upon the receipt thereof, and objecting to the magistrate who signed the certificate, but not to the form of the certificate.<sup>149</sup> So the secretary may bind the company by his admissions, made in the course of correspondence, as to the sufficiency of proofs of loss, where he is generally authorized to answer all communications of the insured;<sup>150</sup> and the assignee of a policy is justified in inferring that it had been canceled by the company where he receives a letter from its secretary stating that all policies were canceled by the company for failure to pay assessments within thirty days.<sup>151</sup> So evidence is not competent of the admissions of the secretary to prove that the property was insured at the time of the fire, when he was not then engaged in any act connected with his agency. Such evidence is not a part of the *res gestae*, nor is such testimony competent to disprove the agent's denial of such claimed admission.<sup>152</sup> A secretary who has authority to collect assessments may waive a forfeiture for nonpayment of premiums.<sup>153</sup> So a secretary of a mutual benefit association may bind it by a statement to the insured that he need not pay his dues until certain charges, then pend-

<sup>146</sup> See sec. 387, ante.

<sup>147</sup> *Leary v. Blanchard*, 48 Me. 269.

<sup>148</sup> *Lewis v. Monmouth etc. Ins. Co.*, 52 Me. 492.

<sup>149</sup> *Bailey v. Hope Ins. Co.*, 56 Me. 474.

<sup>150</sup> *Troy Fire Ins. Co. v. Carpenter*, 4 Wls. 32.

<sup>151</sup> *Columbia Ins. Co. v. Masonhelmer*, 76 Pa. St. 188.

<sup>152</sup> *First Baptist Church v. Brooklyn etc. Ins. Co.*, 28 N. Y. 153.

<sup>153</sup> *Loughbridge v. Iowa L. & E. Assn.*, 84 Iowa, 141; 50 N. W. Rep. 568.

ing against him, were determined, where such charges, if true, would operate to forfeit the policy, and such statement is not *ultra vires*;<sup>154</sup> and where a policy has lapsed for nonpayment of premiums, it may be extended by the oral agreement of the secretary, made out of the state, where the home office is located.<sup>155</sup> The secretary of the company is one of its general managing agents, and when in the discharge of the duties of his office represents the corporation. The test of his authority is not whether he acted in the general office of the company or in another state, but whether, at the time, he was engaged in the general duties of his office.<sup>156</sup> But notice to the company of a sheriff's sale of the property, and of an equitable title thereto in the assured, may be established by proof that the assured had conversed with the secretary of the company in relation to the sale, and had told him that the property was his the same as before the sale, although it was shown, in connection with this testimony, that there was also a public notice of the sale;<sup>157</sup> though knowledge of the company does not arise, as a matter of law, from the fact that an agent of the company told the secretary of the use of cotton-gins, which increased the risk, where such information was given the secretary on the street and in another town, and he forgot the fact.<sup>158</sup> And a mutual company is not estopped from claiming the violation of a by-law not set out in the policy, although the treasurer of the company, upon being asked by the holder, in the presence of the secretary, if the policy expressed all the conditions and he replied that it did, the secretary remaining silent.<sup>159</sup> So a change of beneficiaries is not valid, although consented to by the secretary, where such act is not within the scope of his authority, and the provisions of the constitution relating to such changes are not complied with.<sup>160</sup> The secretary cannot issue a policy

<sup>154</sup> *Jones v. National Mut. B. Assn.*, 84 Ky. 110; 2 S. W. Rep. 447.

<sup>155</sup> *Hastings v. Brooklyn Life Ins. Co.*, 44 N. Y. 37.

<sup>156</sup> 138 N. Y. 473; 53 N. Y. 63.

<sup>157</sup> *Elliott v. Ashland Mut. F. Ins. Co.*, 117 Pa. St. 548; 12 Am. Rep. 670.

<sup>158</sup> *Texas Banking Co. v. Hutchins*, 53 Tex. 61; 37 Am. Rep. 750.

<sup>159</sup> *Miller v. Hillsborough Mut. F. Assn.*, 42 N. J. Eq. 459.

<sup>160</sup> *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682; 84 N. W. Rep. 470.

to himself so as to bind the company without its actual knowledge of the facts.<sup>161</sup> If the secretary undertakes to act in filling out the application, the presumption arises that the company waives inquiry into matters concerning which information is not requested. Statements of facts in the application may be waived by the failure of the secretary who fills it out to insert them therein.<sup>162</sup> Where the proofs of loss were pronounced insufficient by the company, and the evidence is contradictory upon the question whether there was a waiver or not by the secretary, the question of waiver is for the jury.<sup>163</sup> The secretary has authority to bind the company by his acts done in the usual course of business, and in such case his consent to an assignment of the policy indorsed thereon is presumptively the consent of the company, although the policy provided that such consent must be in pursuance of the by-laws, and although there was no resolution of the board of directors authorizing the secretary's action.<sup>164</sup> So where the policy requires that notice and preliminary proofs of loss be sent to the secretary, he is the agent of the company, fully empowered to acknowledge the receipt thereof and to determine their sufficiency, and his admissions relating thereto will bind the company;<sup>165</sup> and it is sufficient if such notice of loss be transmitted to the secretary by a local agent of the company, upon knowledge thereof, given the latter by the assured.<sup>166</sup> The company is bound by an oral agreement to pay the loss within a certain time, made by the secretary in the presence of the president of the company, who did not dissent, where the assured also receives a writing, signed by the company's secretary and general agent, notifying him of the acceptance of

<sup>161</sup> *Pratt v. Dwelling-House Mut. F. Ins. Co.*, 53 Hun (N. Y.), 101.

<sup>162</sup> *Trifenthal v. Citizens' etc. Ins. Co.*, 53 Mich. 306.

<sup>163</sup> *Susquehanna Mut. F. Ins. Co. v. Hallock* (Pa. 1888), 14 Atl. Rep. 167.

<sup>164</sup> *Conover v. Mutual Ins. Co. of Albany*, 3 Denio (N. Y.) 254; affirmed, 1 N. Y. 290; *Duray v. Hudson Ins. Co.*, 24 N. J. L. (4 Zab.) 171. But see *Loring v. Manufacturers' Ins. Co.*, 8 Gray (Mass.) 28.

<sup>165</sup> *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20.

<sup>166</sup> *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; 80 Am. Dec. 573.

the proofs of loss.<sup>167</sup> Again, orders for the payment of the loss, signed by the secretary, constitute, if he knew all the facts, a conclusive waiver in writing within the terms of a by-law, providing that there could be no waiver of any conditions of the policy except by indorsement on, or specific acknowledgment in, the policy.<sup>168</sup> Where two companies, doing business under one name, issued a policy which provided that proofs of loss should be given to the companies, it is a sufficient compliance with the conditions if such proofs are given to a person who acted as secretary for both companies, and by him given to one who acted as president of both companies, and had charge of their loss department.<sup>169</sup> But the secretary has no authority to bind the company by a statement in a letter written to a broker that the company would see that certain policies issued by other offices were adjusted satisfactorily. In this case the company had sent its own policy for part of the amount of insurance requested and those of three other companies for the balance.<sup>170</sup>

**§ 402. Powers of Assistant Secretary.**—It is held in Virginia<sup>171</sup> that an assistant secretary of a life insurance company may waive the forfeiture of a policy arising from the nonpayment of premiums when due, and that he has authority to reinstate the policy.

**§ 403. Powers of Treasurer.**—The treasurer of an insurance company, from the nature of his office, is authorized to receive moneys, and it becomes his duty to account for the same.<sup>172</sup> But borrowing money to pay benefits in the association is not an act within the scope of his official duties;<sup>173</sup> nor does the fact that he received assessments from the insured,

<sup>167</sup> *Farmers' etc. Ins. Co. v. Chestnut*, 50 Ill. 111.

<sup>168</sup> *Farmers' Mut. F. Ins. Co. v. Gargett*, 42 Mich. 289.

<sup>169</sup> *Minnock v. Eureka etc. M. Ins. Co.*, 90 Mich. 236; 51 N. W. Rep. 367.

<sup>170</sup> *Constant v. Alleghany Ins. Co.*, 3 Wall. Jr. (C. C.) 313.

<sup>171</sup> *Piedmont etc. Life Ins. Co. v. McLean*, 31 Gratt. (Va.) 517.

<sup>172</sup> See *Portage County Mut. Ins. Co. v. Wetmore*, 17 Ohio, 330; *N. E. Car Spring Co. v. Union etc. Co.*, 4 Blatchf. (C. C.) 1.

<sup>173</sup> *Screwmen's B. Assn. v. Smith*, 70 Tex. 168; 7 S. W. Rep. 793.

after knowledge of his misrepresentation as to his age, validate the contract.<sup>174</sup> He may, however, bind the company by all acts within the usual course of his business,<sup>175</sup> and if the treasurer of a corporation has been accustomed, with the knowledge and consent of the company, to pursue a certain course of business for a number of years, such as signing and indorsing business paper in its name, and a person, with knowledge of such custom, becomes a purchaser of an accommodation note indorsed to him for value, the company is estopped to deny the authority of the treasurer to perform such act.<sup>176</sup> The last two decisions, while not those relating to insurance, would, however, by analogy be applicable to the acts of treasurers of insurance companies, since the principles underlying them are those applicable to all agents in general.

**§ 404. Powers of Directors.**<sup>177</sup> — It is a general rule that where a body is intrusted by the charter with the management of the affairs of the corporation, and the mode of action is prescribed therein, the company can act only through the designated parties and in the manner specified.<sup>178</sup> But in the absence of provisions in the statutes or by-laws limiting the authority of directors, their powers are supreme.<sup>179</sup> The relation which directors sustain to the corporation or stockholders is fiduciary in its character, and there is an implied rule of law, applicable to all trustees, that they will not abuse the confidence or trust reposed in them.<sup>180</sup> A director cannot vote upon

<sup>174</sup> *Swett v. Citizens' Mut. Relief Soc.*, 78 Me. 541; 7 Atl. Rep. 394.

<sup>175</sup> *Stark Bank v. United States Pottery Co.*, 34 Vt. 144.

<sup>176</sup> *Second Nat. Bank v. Pottier etc. Mfg. Co.*, 18 N. Y. 954; 2 St. R. 644, annotated case.

<sup>177</sup> Under the general corporation law of New York the term "directors," used in relation to corporations, includes trustees or other persons appointed or designated to manage the affairs of the corporation: *Laws 1892, c. 687*; *Jones on Business Corporation Law*, 83.

<sup>178</sup> See *Union Mut. Ins. Co. v. Keyser*, 32 N. H. 313; 64 Am. Dec. 375.

<sup>179</sup> *Beveridge v. New York El. Ry. Co.*, 112 N. Y. 1; *Gamble v. Queens Co. Water Co.*, 123 N. Y. 91.

<sup>180</sup> *Hoyle v. Plattsburg etc. R. R. Co.*, 54 N. Y. 314; 13 Am. Rep. 595, per *Johnson, C.*; *Brinkerhoff v. Bostwick*, 88 N. Y. 52; *Chase v. Vanderbilt*, 62 N. Y. 307.



a matter in which he is personally interested.<sup>181</sup> Individual directors cannot act validly in a matter which the charter requires to be done by the board;<sup>182</sup> but the board may act through others by virtue of a statutory authorization, as where they appoint a committee to act.<sup>183</sup> The directors may by their acts, done with full knowledge of the facts, waive conditions in the policy. So if the policy provides that all claims under it shall be forfeited for fraud of the assured in making proofs of loss, and the assured, in good faith, includes therein articles not her own, and such act is done with the knowledge of an officer of the company, and the directors thereafter, knowing all the facts, order the policy paid, they thereby waive the forfeiture.<sup>184</sup> In an Iowa case the by-law of a mutual company provided that the directors might recover the whole premium note, and annul the policy at their option, upon the nonpayment of an assessment. A member was delinquent in making payment, and the directors voted that he should lose all the benefit under his policy during the period of such default, but that he should be liable for future assessments, and it was decided that the directors had not exceeded their authority by such conditional annulment.<sup>185</sup> So the directors, or an agent authorized by them, may rescind, by mutual agreement with the insured, a contract of insurance, for it is essentially necessary to the safe and proper conduct of the company's business that such a power should exist in its board of directors.<sup>186</sup> The acts of the directors of a mutual company in assessing a premium note are not judicial, and they are obligated in making such assessment to comply with the requirements of the company's charter, or their acts are invalid.<sup>187</sup> So evidence is admissible, in an action on the policy in a mutual company, that

<sup>181</sup> *Beers v. New York Life Ins. Co.*, 49 N. Y. 182; *Gamble v. Queens Co. Water Co.*, 123 N. Y. 91.

<sup>182</sup> *People's Mut. Ins. Co. v. Westcott*, 14 Gray (Mass.), 440; *Monmouth Mut. F. Ins. Co. v. Lowell*, 59 Me. 504.

<sup>183</sup> *Sheridan Electric Light Co. v. Chatham Nat. Bank*, 127 N. Y. 517; 52 Hun (N. Y.), 580.

<sup>184</sup> *Farmers' Mut. F. Ins. Co. v. Gargett*, 42 Mich. 289.

<sup>185</sup> *Coles v. Iowa etc. Ins. Co.*, 18 Iowa, 425.

<sup>186</sup> *Boland v. Whitman*, 33 Ind. 64.

<sup>187</sup> *Herkimer County Mut. Ins. Co. v. Fuller*, 14 Barb. (N. Y.) 373.

an assessment was levied at a meeting where only five directors, out of thirteen, were present, if such a number constitutes a quorum under the by-laws of the company,<sup>188</sup> and the authority of the directors of a mutual company to lay an assessment after a certain date is not taken away by a vote of the board that all outstanding policies shall be canceled on such certain date.<sup>189</sup> But a minority of the directors cannot legally make an assessment to meet losses and expenses for a certain term;<sup>190</sup> nor can the insured bind the company, by giving notice of loss to a director, where the policy provides that such notice must be given to the company's secretary or other authorized officer.<sup>191</sup> But it is held that the directors' acts in consenting to an assignment of a policy constitutes a waiver as to prior insurance, effected contrary to a charter provision that the application shall state the existence of prior insurance or the policy shall be void.<sup>192</sup> Again, the trustees of a mutual benefit society have no power to vote back pay to themselves.<sup>193</sup> And it is held in Connecticut that the knowledge of a director must have been obtained by him while acting officially in the course of his business in order to bind the company, unless he is acting under some special authority other than that merely of a director.<sup>194</sup> Parsons,<sup>195</sup> however, denies that this case is a correct statement of the law, and asserts that if the director

<sup>188</sup> *Susquehanna Mut. F. Ins. Co. v. Tunkhannock Toy Co.*, 97 Pa. St. 424.

<sup>189</sup> *Fayette etc. Ins. Co. v. Fuller*, 8 Allen (90 Mass.), 27.

<sup>190</sup> *Monmouth etc. Ins. Co. v. Lowell*, 59 Me. 504.

<sup>191</sup> *Inland etc. Ins. Co. v. Stauffer*, 33 Pa. St. 397.

<sup>192</sup> *Barnes v. Union etc. Ins. Co.*, 45 N. H. 21.

<sup>193</sup> *State v. People's etc. Assn.*, 42 Ohio St. 579.

<sup>194</sup> *Farrell Foundry v. Barb*, 26 Conn. 376. See *Sterrett v. Pennsylvania F. Ins. Co.*, 68 Iowa, 674; *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517; 69 Am. Dec. 174; *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361.

<sup>195</sup> *May on Insurance*, Parsons' ed., sec. 133 D. He says: "Time of acquiring knowledge is immaterial if present or so late as to be presumably present in the mind of the agent at the time he acts in the business to which it relates. . . . It would be ridiculous to hold that a board of directors might act as though ignorant of a fact that came to them on the street or otherwise before the hour of board meeting." He cites the two first cases in the last note.

had the knowledge "in mind when he acted in the company's business," the company would be bound. While this might be true, if the fact were conceded on the trial, we apprehend that otherwise there might be some difficulty in proving that the director "had it in mind when he acted in the company's business." Exactly how late must the knowledge be acquired so as to "be presumably present in the mind of the agent at the time he acts in the business to which it relates?" While the nearness in time when the information was acquired to the time when the director acted "in the company's business" might perhaps afford an inference of knowledge on his part while so acting, it would seem, in the absence of other proof, too nearly hypothetical to justify, as against the company, a deduction of actual knowledge, at such meeting, on the part of the agent. The true test ought always to be, Was the knowledge acquired by the agent under such circumstances as to justify a fair and reasonable presumption that he was acting within the apparent scope of his authority at the time? If so, the company should be bound;<sup>196</sup> and we might add that if the proof is clear that at the time of acting for the principal such knowledge was present to the agent's mind, the principal would be bound. But the evidence ought certainly to be clear and satisfactory.<sup>197</sup>

**§ 405. Powers of Superintendent.**—The power of a superintendent to represent or bind the company may be expressly conferred or may arise by implication from the acts and declarations of the company; and if an insurance company is responsible for the acts of its superintendent in making such representations, evidence is admissible that delay in bringing an action was caused by such agent's assurances that the company would pay the claim, if just. If such assurances were acted upon, they will estop the company, notwithstanding a provision of the policy that agents of the company are not authorized to waive forfeitures.<sup>198</sup> It further appeared, however, in this case that there had been several communica-

<sup>196</sup> See sec. 544, 545, herefn.

<sup>197</sup> See *Satterfield v. Malone*, 35 Fed. Rep. 445.

<sup>198</sup> *Jennings v. Metropolitan Life Ins. Co.*, 148 Mass. 61; 18 N. E. Rep. 601.

tions between the company and the claimant, that the superintendent had received the proof of death, and had put his certificate thereon, and the answer of the company to the claim and proofs were made through him. There was no evidence of his authority other than that given by himself, which was that he had solicited insurances and forwarded applications, and had authority to receive and deliver the amount paid in settlement of just claims. It would seem, therefore, that he was held out by the company as possessing the authority exercised.<sup>199</sup>

**§ 406. Powers of General Managers.**—Where agents of foreign companies represent them as general managers or managers, they have generally large discretionary powers in regard to making insurances and transacting business relating thereto. Their powers are similar to those of officers of the company. A resident agent, designated officially as “manager,” has authority to employ another to solicit risks, contract therefor, to deliver policies, and collect premiums, and the acts of the agent so appointed, done within the employment, will bind the company.<sup>200</sup> He may also waive conditions in the policy, and estop the company by his acts within the scope of his authority.<sup>201</sup> And where he has entire control of the company’s affairs, he may bind it by acts warranted by an established course of business recognized by the members, although no express authority so to act may be conferred on him.<sup>202</sup>

**§ 407. Agency of Subordinate Lodges.**—In certain mutual benefit societies which do what is substantially an insurance business on the lodge system, the contract of insurance, or the contract for the payment of money upon the decease of a member, is made through the local lodge with the supreme or grand lodge, while the contract for sick benefits is made with the

<sup>199</sup> See sec. 425-427, 393, 394, herein.

<sup>200</sup> *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463.

<sup>201</sup> See *McGurk v. Metropolitan Life Co.*, 56 Conn. 528; *Eastern R. R. Co. v. Relief Ins. Co.*, 105 Mass. 570; *Insurance Co. v. Mahone*, 21 Wall. (U. S.) 152.

<sup>202</sup> *Topeka P. A. U. B. v. Martin*, 39 Kan. 750.

local lodges, and the payment thereof is made out of the funds of the local lodge. These local lodges may, however, be authorized by the constitution and by-laws to act in the matter of receiving applications for re-admission to the society and restoration to membership therein. Again, membership in such organizations is frequently made dependent by the by-laws upon the continuance of membership in the subordinate society, and where such membership ceases in the subordinate organization, it is terminated in the society.<sup>203</sup> Many questions have arisen from this complex system. The difficulty of formulating any positive and certain rule concerning the exact status of such subordinate or local lodges, as to the member and the society, is also greatly increased by the fact that the provisions of various charters or articles of association are so diverse and the by-laws themselves are frequently so ambiguous; moreover, the decisions in apparently analogous cases are often so widely divergent and conflicting, as to be irreconcilable on any common ground or principle of the law of agency. The starting point in the determination of the extent of authority of such subordinate lodges must be, and necessarily is, the constitution, the charter or articles of association, and the by-laws which govern their action and are the source of their authority, as well as by the law of the land affecting such associations.<sup>204</sup> And the presumption exists that applicants for membership have acquainted themselves with the extent of the authority of such lodges,<sup>205</sup> and members at least are assumed to be cognizant of the provisions of the charter and by-laws, which the contract embodies, and to have assented thereto.<sup>206</sup> It would also seem that in so far as these societies do an insurance business, they should be governed by the same principles as apply to other mutual life insurance companies.<sup>207</sup> The general rule may be stated that in societies of the character under consider-

<sup>203</sup> See *Burbank v. Boston Relief Assn.*, 144 Mass. 434.

<sup>204</sup> See *Luch v. Harris*, 2 Brewst. (Pa.) 571; *Dolan v. Court Good Samaritan*, 128 Mass. 439.

<sup>205</sup> *Supreme Lodge etc. v. Grace*, 60 Tex. 569.

<sup>206</sup> *Hellenberg v. District No. 1*, 94 N. Y. 580; *Schenck v. Gegenzelter*, 44 Wis. 369.

<sup>207</sup> See *Erdmann v. Mutual Ins. Co.*, 44 Wis. 379, per *Cole, J.*

ation the local lodges may be principals in matters relating to the payment of benefits to sick members, where the contract is with them and depends upon their constitution and by-laws. When the contract for the payment of moneys on the death of a member is made, however, with the supreme or highest lodge, acting through the subordinate or local lodge, and the certificate of insurance is issued by the former and the assessments collected by the latter, then the former is the principal, and its constitution and by-laws govern the contract, and the latter act in these matters as the agents of the former, and are subject to their direction and control.<sup>208</sup> The subordinate lodges may also act through their ministerial officers, who then become their agents. The decisions are clearly not reconcilable upon the doctrine of waiver by mutual benefit societies. It has, however, been held that neither subordinate lodges nor their ministerial officers can set aside or waive the positive requirements of the rules of the order, and that therefore the doctrine of waiver by subordinate lodges has no application to forfeitures of membership in such order. In this case dues were payable to the subordinate lodge for local purposes, and also to the supreme lodge for insurance benefits. The member at his decease stood suspended for nonpayment of assessments. The subordinate lodge had treated him, however, as a member, and credited his insurance dues as money payable to the supreme lodge by it; but the court held that no recovery could be had by the beneficiary.<sup>209</sup> In such cases of failure to pay assessments, where the by-laws provide that the delinquent shall cease to be a member, the law is said to be self-executing and the nonpayment of itself works a forfeiture.<sup>210</sup> But a forfeiture may, it is held, be waived where the local lodge receives and the supreme lodge retains, with knowledge, assessments

<sup>208</sup> See Bacon's Benefit Societies and Life Insurance, secs. 11, 118, 144, 146, 148-50, 206.

<sup>209</sup> *Borgraefe v. Knights of Honor*, 22 Mo. App. 127, per Thompson, J. See *Swett v. Citizens' Mut. R. Soc.*, 78 Me. 541; *Splawn v. Chew*, 60 Tex. 532.

<sup>210</sup> *Rood v. Railway Passengers' etc. B. Assn.*, 31 Fed. Rep. 62. See *Mandego v. Centennial Mut. L. Assn.*, 64 Iowa, 134.

made after the death of a member.<sup>211</sup> When the laws of a relief fund association provided that on notice of the disability of a member a board of physicians should examine him and report to the supreme council, that all proofs for death or disability benefits should be approved by the subordinate council, and that, upon approval of satisfactory proofs of a member's disability, he should be entitled to a benefit, it was held that the subordinate council could not finally reject a claim.<sup>212</sup>

**§ 408. Agency Arising from Necessity of Emergency.**

It sometimes happens that an agent is called upon to exercise an authority in cases of necessity or special emergency which will justify the act. In such cases the duration and extent of the authority is measured by the necessity or emergency. Thus, if an agent of an insurance company makes a demand upon the insured during a fire to remove his goods, such act of the agent, while it may have been outside his authority, and though it may not fix the liability of the insurer for loss by theft during the removal, it is nevertheless a powerful and significant fact to establish the propriety of the removal,<sup>213</sup> although in such case the insurer would probably be liable on the ground that goods were damaged *ex necessitate* to protect them.<sup>214</sup> Generally, it is a rule of agency that if the act of the agent is warranted by the necessity or emergency, and is done in good faith, the principal is bound, otherwise the object and purposes of the agency might be defeated.<sup>215</sup>

<sup>211</sup> See *Manning v. A. O. U. W.*, 86 Ky. 136; 5 S. W. Rep. 385; *Erdmann v. Mutual Ins. Co. etc.*, 44 Wis. 376; *Schenck v. Gegenzeiter*, 44 Wis. 369; *Schen v. Grand Lodge*, 17 Fed. Rep. 214.

<sup>212</sup> *Albert v. Order of Chosen Friends* (Ky. 1887), 34 Fed. Rep. 721.

<sup>213</sup> *Leiber v. Liverpool etc. Ins. Co.*, Bush (Ky.), 639; 99 Am. Dec. 695.

<sup>214</sup> See *Gordon v. Remington*, 1 Camp. 123; *Independent etc. Ins. Co. v. Agnew*, 34 Pa. St. 96; 75 Am. Dec. 638; *Witherell v. Maine Ins. Co.*, 49 Me. 200; *Newmark v. Liverpool etc. Ins. Co.*, 30 Mo. 160; 77 Am. Dec. 608.

<sup>215</sup> See *Greenleaf v. Moody*, 13 Allen (95 Mass.), 363; *Lawler v. Keaquick*, 1 Johns. Cas. (N. Y.) 175, 179, n.; *Jervis v. Hoyt*, 2 Hun (N. Y.), 637; *Williams v. Shackelford*, 16 Ala. 318; *Judson v. Sturges*, 5 Day (Conn.), 556, 560; *Goodiville v. McCarthy*, 45 Ill. 186; *Dusar v. Perit*, 4 Binn. (Pa.) 361.

§ 409. **Agent Delegated for Special Purpose.**—A waiver or estoppel may arise against, or knowledge be imputed to, the company in cases where it specially delegates an agent to act in a particular matter, or where it gives special instructions to the agent in relation to the insurance or to the execution of some act concerning the application, the policy, or the loss.<sup>216</sup> Thus, if the company does not rely upon the statements of the applicant, but sends its own agent to examine the premises, and the agent does so, and inserts a misdescription of the building in the policy, the company is liable for the amount of the insurance in case of loss, even though there is a warranty, and the insured, although acting in good faith, aided in the erroneous description.<sup>217</sup> So a subagent, with authority to represent the company in a particular line of its business, becomes, in relation thereto, the company's direct representative, so as to bind it by a notice to him, or by any acts which the nature of the business intrusted to his care may warrant.<sup>218</sup> And if the company sends two agents at different times to ascertain the loss, and invests them with authority to compromise and settle the same, it thereby waives objection to delay in sending the notice, and is estopped from defending on the ground that the notice was not sent "forthwith";<sup>219</sup> and where a clerk in another office than that of the company is requested by the general adjuster to go to a certain city and see about a loss, and examine the business, he has authority to adjust the same.<sup>220</sup> Again, if the company places the claim of the insured in the hands of an agent for adjustment, his demands in the course of the business may constitute a waiver of the conditions of the policy in relation to the loss.<sup>221</sup> But it is held that where a general agent is sent to examine into the circumstances sur-

<sup>216</sup> See *Cumberland Valley Ins. Co. v. Schell*, 29 Pa. St. 31; *Roth v. City Ins. Co.*, 6 McLean, 324; *Comm. Ins. Co. v. Ives*, 56 Ill. 402.

<sup>217</sup> *Continental Ins. Co. v. Kasey*, 25 Gratt. (Va.) 268; 18 Am. Rep. 681.

<sup>218</sup> *Massachusetts Life Ins. Co. v. Eshelman*, 30 Ohio St. 647.

<sup>219</sup> *Lycoming etc. Ins. Co. v. Schollenberger*, 42 Pa. St. 188; 82 Am. Dec. 501.

<sup>220</sup> *Swain v. Agricultural Ins. Co.*, 37 Minn. 390; 34 N. W. Rep. 738.

<sup>221</sup> *Brown v. State Ins. Co.*, 74 Iowa, 428; 38 N. W. Rep. 135.

<sup>222</sup> *Insurance Co. v. Mahone*, 21 Wall. (U. S.) 152.



rounding the death of the insured, that the company is not bound by his expression of opinion as to the advisability of a settlement by the company;<sup>222</sup> and where a broker is sent by the agent of whom the company had sought the required information to ascertain the ownership of the property insured, and the broker returns false information, though the assured told him the truth, the company is responsible.<sup>223</sup>

**§ 410. Agency—Person Referred to by Company.—**

Where a party is referred to by the company for information or for conduct of a particular matter, or as a person to exercise certain authority in reference thereto, the powers of such agent, although limited to the subject of reference, is nevertheless co-extensive therewith, and his acts and declarations concerning the same bind the company, although it is held that if he volunteers information not called for where he is to answer certain questions, that the principal is not obligated thereby.<sup>224</sup> Where a party is formally referred to as general agent by the company, in regard to exchanging a paid-up policy, and in consequence of the agent's advising him not to exchange and giving him time to decide, a default is made in the payment of the premium by the assured, the company is bound by the waiver arising from such affirmative act of the agent,<sup>225</sup> and if the company, on receiving notice of loss, refers the insured to its resident agent for settlement, who is instructed to procure a statement of the loss, he is invested with authority to extend the time for furnishing the proofs.<sup>226</sup> Again, if the secretary and manager refers a person to a clerk of the company as to the validity of the policy, any important information given by the former to the latter, although not reported to the manager, operates as notice to the company.<sup>227</sup>

<sup>222</sup> *Insurance Co. v. Mahone*, 21 Wall (U. S.) 152.

<sup>223</sup> *Mullen v. Vermont F. Ins. Co.*, 58 Vt. 113.

<sup>224</sup> See *Swett v. Fairlie*, 6 Car. & P. 1. per Lord Denman, C. J.; *Rawls v. American Mut. Life Ins. Co.*, 27 N. Y. 282, 294; 84 Am. Dec. 280.

<sup>225</sup> *Wyman v. Phoenix Mut. L. Ins. Co.*, 119 N. Y. 274; 29 St. R. 567; 23 N. E. Rep. 907.

<sup>226</sup> *Lycoming Fire Ins. Co. v. Schollenberger*, 44 Pa. St. 259.

<sup>227</sup> *Fitzpatrick v. Hartford L. etc. Ins. Co.*, 56 Conn. 116; 6 N. Eng. Rep. 180; 27 Cent. L. J. 336; 13 Atl. Rep. 673.

§ 411. **Powers of Clerk.**—There is no doubt concerning the right of an agent to employ clerks, since it cannot be presumed that an agent will attend personally to all the details of his business. So he may employ them to attend to his office during his absence or sickness;<sup>228</sup> to contract for risks, collect premiums, receive payment thereof in cash, give credit therefor, or take securities;<sup>229</sup> to receive applications, fill out policies and renewals, and attend to whatever business "is transacted behind the counter";<sup>230</sup> and the act of the clerk is in all such cases the agent's act, and binds the company the same as if done by the agent personally.<sup>231</sup> Acts done and information given by an agent's clerk or employee of an agent in the line of his duty bind the company. The following from the opinion of the court in this case is important: "It was suggested in argument, and some reliance seems to be placed on the suggestion, that inasmuch as the statement that the policy in controversy had been renewed was made by William B. Shepard, who was an employee of Benson & Kirtland, the defendant company is not affected or bound by that representation. The facts with reference to this contention seem to be that Shepard was a confidential employee and book-keeper of the firm of Benson & Kirtland, and had been in their service some years. He was fully posted as to the details of the business carried on by the firm, and in their absence had full charge of the office, and was undoubtedly authorized by them to give information as to whether a particular policy that had been registered on the books of the agency had or had not been renewed. . . . The evidence in the case at bar shows that the statement made by Shepard to Gibson, that the policy in question had been renewed, was made in the company's office, while Shepard had charge of the same, and

<sup>228</sup> *Deltz v. Providence etc. Ins. Co.*, 83 W. Va. 526; 11 S. E. Rep. 50.

<sup>229</sup> *Bodine v. Exchange Fire Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566.

<sup>230</sup> See *Cooke v. Aetna Ins. Co.*, 7 Daly (N. Y.), 555.

<sup>231</sup> *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566; *Hough'on v. Ewbank*, 4 Camp. 88; *Mound City L. Ins. Co. v. Heath*, 49 Ala. 529; *Arff v. Starr F. Ins. Co.*, 125 N. Y. 57; 34 St. R. 366; 25 N. E. Rep. 1073; *Kinney v. Insurance Co.*, 36 Hun (N. Y.), 66.

while he had custody of the policy register. The statement was made in the line of his duty, not in answer to an idle inquiry, but in response to a question asked by a policy holder, who was interested in knowing if a certain policy had been renewed and continued in force. It does not follow that because a person is employed by an agent of an insurance company, rather than by the company itself, none of such person's acts or representations are binding on the company. It is customary for agents having charge of important agencies to employ persons to perform clerical and much other work in their office, and to assist them generally in the discharge of the various duties which such agents have to perform. The business of insurance could not well be transacted without such assistants, and all insurance companies are doubtless well aware of the practice of employing them. It results from this well-known business usage that acts done and information given by such subordinate employees in the line of their duty should be held binding upon the companies which they represent. We think, therefore, that presumptively Shepard had authority to inform Gibson whether the policy now in question had or had not been renewed, and that the statement made by him should be given the same effect as if it had been made by either Benson or Kirtland."<sup>232</sup> The fact that the policy provides that no persons shall be considered the company's agent except such "as shall hold the commission of this company," does not operate to prevent such employment being valid.<sup>233</sup> Where a clerk is deputized to examine and report upon certain property, and to write out a policy thereon, the right to recover on such policy is not defeated by a clerical error of the clerk in writing in the name of another than that of the true owner, and such mistake may be corrected in an action on the policy.<sup>234</sup> A clerk may by virtue of his employment be authorized to bind the company by a parol contract;<sup>235</sup> to receive notice of and

<sup>232</sup> *International Trust Co. v. Norwich F. Ins. Soc.*, 17 U. S. C. C. A. 608, 614, per Thayer, C. J.

<sup>233</sup> *Arff v. Starr F. Ins. Co.*, 125 N. Y. 57; 34 St. R. 366; 25 N. E. Rep. 1073.

<sup>234</sup> *Deltz v. Providence etc. Ins. Co.*, 33 W. Va. 526; 11 S. E. Rep. 50.

<sup>235</sup> *Cook v. Aetna Ins. Co.*, 7 Daly (N. Y.), 555.

consent to other insurance;<sup>236</sup> to bind the company by a material alteration of the terms of the policy, where he is a clerk in the company's office and makes the same alteration in the insurer's records, although it is proven that he had no authority to make or alter contracts for them,<sup>237</sup> and he may contract with the insured after a fire to repair the building insured.<sup>238</sup> So the company may be bound by his knowledge of the existence of other insurance on the property where he solicits the risk and takes the application, and the agent employing him therefor issues the policy, and in such case the condition making the policy void for prior insurance without notice is waived.<sup>239</sup> But it is held that a person employed to fill out and issue policies as mere clerical work cannot consent to additional insurance nor waive a forfeiture therefor, and is not an agent to receive notice of additional insurance.<sup>240</sup> It is also held that a clerk in an insurance office cannot bind the company by receiving overdue premiums.<sup>241</sup> But it is also held that the company is not relieved from liability where the clerk of a local agent fails to note the fact of other insurance in the application which he had written, it appearing that other risks upon the property were held by said agents, and that the clerk was so informed at the time by the assured.<sup>242</sup> So a clerk in the employ of a firm acting as general agent of the company, said clerk being empowered to solicit insurance for the firm, receive premiums, fill out and deliver policies, has power to waive a condition in an accident policy providing against death by intentional injuries.<sup>243</sup> Where

<sup>236</sup> *Arff v. Starr F. Ins. Co.*, 125 N. Y. 57; 25 N. E. Rep. 1073. See criticism on this case in *Ostrander on Fire Insurance*, 109. The question, however, turned on the point whether the party receiving the notice was a clerk of the agent's or a mere broker, and he was held to be a clerk.

<sup>237</sup> *Washington Fire Ins. Co. v. Davison*, 30 Md. 91.

<sup>238</sup> *Hilton v. Newman*, 6 Mo. App. 304.

<sup>239</sup> *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600; 31 N. W. Rep. 948.

<sup>240</sup> *Waldman v. North British Mercantile Ins. Co.*, 91 Ala. 170; 8 S. Rep. 606.

<sup>241</sup> *Koelges v. Guardian L. Ins. Co.*, 2 Lans. (N. Y.) 480.

<sup>242</sup> *Steele v. German Ins. Co.*, 93 Mich. 81; 53 N. W. Rep. 514.

<sup>243</sup> *Henderson v. Travelers' Ins. Co.*, 16 U. S. C. C. A. 390; 65 Fed.

one who was either a clerk for or member of a firm of insurance agents promised the assignee of a policy, holding it as mortgagee of the property, that he would either buy the mortgage or obtain a purchaser therefor, such statement is not a waiver of delay in bringing suit where the agents had from the first denied their liability on the ground that the insured had burned the property.<sup>244</sup>

**§ 412. Powers of Medical Examiner.**—A medical examiner is an agent with limited powers, but, nevertheless, his acts in and about the business intrusted to his care are binding within the scope of his authority, and to this extent the same general rules of agency are applicable to him as to other special agents. Where he is required to personally write in the answers to questions in the certificate, and not to allow them to be dictated by any person, and, after the applicant signs the certificate, such agent, without his knowledge, erroneously fills in an answer as to the cause of death of the applicant's sister, the responsibility for the error rests upon the company.<sup>245</sup> And where the examination blanks are sent to the medical examiner, with directions to complete the same, and he has to some extent acted as and represented himself to be the company's general agent, and occupied its office, the principal is estopped to set up the falsity of the answers, though erroneously written by such agent;<sup>246</sup> and the same ruling obtains where such physician assumes to write in the answers upon his own knowledge of the facts, instead of relying upon the answers given by the applicant.<sup>247</sup> So the certificate of the medical

Rep. 438; 24 Ins. L. J. 351. That notice to clerk of general agent with power to solicit insurance and issue policies, except signing, is notice to company, see *Phoenix Ins. Co. v. Ward* (Tex. 1894), 26 S. W. Rep. 763.

<sup>244</sup> *Coryeon v. Providence etc. Ins. Co.*, 79 Mich. 187; 44 N. W. Rep. 431.

<sup>245</sup> *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281; 36 Am. Rep. 617; 92 N. Y. 274; 44 Am. Rep. 372.

<sup>246</sup> *Flynn v. Equitable Life Ins. Co.*, 78 N. Y. 568; 34 Am. Rep. 561, Earl, J., dissented. But see the same case, 67 N. Y. 500; 23 Am. Rep. 134.

<sup>247</sup> *Pudritzky v. Supreme Lodge Knights of Honor*, 76 Mich. 428; 43 N. W. Rep. 373.

examiner is conclusive upon the company as to its recitals in the absence of fraud of the applicant in making the representations or in concealing material facts;<sup>248</sup> and in answering the questions of the medical examiner the applicant has the right to rely upon his construction of them at the time, and may answer them in the light of such interpretation.<sup>249</sup> So if such agent, knowing the facts, suggests answers which are made in accordance therewith, the company is bound,<sup>250</sup> and the company is estopped to show incompetency of its medical examiner.<sup>251</sup>

**§ 413. Whether One is Agent or Broker.**—Whether one is an agent or broker is a question necessarily dependent upon the particular facts of each case. Thus one employed to solicit applications for insurance, and to fill up and issue policies, is not an insurance broker, within the terms of a city ordinance providing for the payment of a license fee by such broker.<sup>252</sup> Again in a New York case<sup>253</sup> it appeared that one R. was the agent of several insurance companies, but not of the defendant, whose agent was one J. R. wrote his own name on an application as “general agent,” and took a premium note for the regular premium and another note for a portion of the premium payable, at a certain date thereafter, conditioned that the policy should become void in case of nonpayment of the note when due. The policy also contained a like condition. Thereafter, the insured delivered to R. another note for a larger sum, payable to his order, which he discounted and retained the proceeds. The two prior notes were delivered through J. to the defendant. Receipt of the payment of the first premium was acknowledged in the policy.

<sup>248</sup> *Holloman v. Life Ins. Co.*, 1 Woods (C. C.), 674. See *Hogle v. Guardian Life Ins. Co.*, 4 Abb. Pr., N. S. (N. Y.), 346; *Valton v. National L. F. Soc.*, 1 Keyes (N. Y.), 21; reversing 17 Abb. (N. Y.) 368.

<sup>249</sup> *Connecticut General L. Ins. Co. v. McMurdy*, 89 Pa. St. 363.

<sup>250</sup> *Higgins v. Phoenix etc. Ins. Co.*, 74 N. Y. 6. But see *Flynn v. Equitable Life Assn.*, 67 N. Y. 500; 34 Am. Rep. 561.

<sup>251</sup> *Holloman v. Insurance Co.*, 1 Woods (C. C.), 674.

<sup>252</sup> *Bernheimer v. Leadville*, 14 Col. 518; 24 Pac. Rep. 332. See *East Texas F. Ins. Co. v. Brown*, 82 Tex. 631; 18 S. W. Rep. 713.

<sup>253</sup> *How v. Union Mut. L. Ins. Co.*, 80 N. Y. 32.

There was no claim nor proof that the insured understood that R. was the agent of the defendant company. The second note was not paid when due, except as above stated. In an action on the policy it was held that R. was merely a broker, and delivery of the last note to him did not operate as a payment, and that the policy was forfeited.

**§ 414. Whether Broker is Agent of Insured or Insurer.**—In England, an insurance broker represents the insured in effecting the policy, and in other matters relating thereto, but is the underwriter's agent in regard to the premium.<sup>254</sup> The custom of having such broker is declared to have arisen from the fact that the person desiring insurance was frequently at a distance, and was unknown to the underwriter.<sup>255</sup> It is not our purpose, however, to consider in this section the question of agency in connection with the insured, but only the point whether the broker is the agent of the insurer or insured in this country. It is said that "what is understood under the designation of an 'insurance broker' is one who acts as a middleman between the insured and the company, and who solicits insurance from the public under no employment from any special company, but, having secured an order, he either places the insurance with the company selected by the insured, or, in the absence of any selection by him, then with the company selected by such broker."<sup>256</sup> In the United States an insurance broker does not, in the absence of a special agreement, differ from any other broker or agent.<sup>257</sup> It has been held that a broker employed to procure insurance is the agent of the employer.<sup>258</sup> This is also declared to be the rule not only in such case, but also where he is employed to procure the modification

<sup>254</sup> *Minett v. Forrester*, 4 Taunt. 541, n., per Mansfield, C. J.; *East Texas F. Ins. Co. v. Brown*, 82 Tex. 631; 18 S. W. Rep. 713.

<sup>255</sup> *Power v. Butcher*, 10 Barn. & C. 329, 340, per Bayley, J.

<sup>256</sup> *Arff v. Starr F. Ins. Co.*, 126 N. Y. 57; 25 N. E. Rep. 1073.

<sup>257</sup> 1 Phillips on Insurance, 3d ed., 274, sec. 508.

<sup>258</sup> *Hamblett v. City Ins. Co.*, 36 N. Y. 118; *Pottsville Mut. F. Ins. Co. v. M. S. Imp. Co.*, 100 Pa. St. 137.

of the terms of the policy.<sup>259</sup> In another case it was declared that the broker was the agent of the insurer where it appeared that he was paid by commissions received from the company for his services;<sup>260</sup> and the same ruling was made in a case where he received commissions from another agent of the company.<sup>261</sup> In a Michigan case<sup>262</sup> he is held to be the agent for the insured so far as he acts "as an insurance broker."<sup>263</sup> Where one solicited insurance and turned over the order to a firm of "brokers," who sent a written statement of application to the defendant company, whom, however, they did not represent, and had no relations with them, they were held agents of the plaintiff and not of the company.<sup>264</sup> But in another case it is held that if such broker procures the policy for the insured, he is his agent, as to subsequent installments of premiums paid to the broker, where the policy provides that in transactions relating to the insurance all persons other than the insured who procure the policy shall be the agent of the insured, and not of the insurer.<sup>265</sup> Substantially the same ruling, viz., that the broker is agent of the assured under similar provisions in the policy, has been made in other cases.<sup>266</sup> Again, it is held in Illinois<sup>267</sup> that it might be shown that the broker acted for the company in

<sup>259</sup> *Standard Oil Co. v. Triumph Ins. Co.*, 3 Hun (N. Y.), 591; 5 Ins. L. J. 594. See as to completing contract, *Marland v. Royal Ins. Co.*, 71 Pa. St. 393; *Union Ins. Co. v. Chipp*, 93 Ill. 96 (case of notice to soliciting broker, being held notice to company).

<sup>260</sup> *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177; 24 N. E. Rep. 100.

<sup>261</sup> *Meadowcraft v. Standard Ins. Co.*, 61 Pa. St. 91.

<sup>262</sup> *Hartford F. Ins. Co. v. Reynold*, 36 Mich. 502.

<sup>263</sup> See, also, *Lycoming F. Ins. Co. v. Rubin*, 79 Ill. 403, 404; 8 Chi. Leg. News, 150.

<sup>264</sup> *Fromherz v. Fankton F. Ins. Co.* (S. Dak. S. C. 1895), 24 Ins. L. J. 672; 63 N. E. Rep. 748.

<sup>265</sup> *Wilbur v. Williamsburg City F. Ins. Co.*, 122 N. Y. 439; 25 N. E. Rep. 926; 34 St. R. 48.

<sup>266</sup> *Wood v. Firemen's Ins. Co.*, 126 Mass. 316; *Sellers v. Commercial F. Ins. Co.* (Ala. 1895), 24 Ins. L. J. 354; 16 S. Rep. 798; *Young v. Newark F. Ins. Co.* 59 Conn. 41; 22 Atl. Rep. 32; *Abbott v. Shawmut Mut. F. Ins. Co.*, 3 Allen (85 Mass.), 213; *Devens v. Insurance Co.*, 83 N. Y. 168; *Mutual Assur. Soc. v. Scottish Union etc. Ins. Co.*, 84 Va. 116; 8 E. Rep. 178; *Sargent v. National F. Ins. Co.*, 86 N. Y. 626; 10 Ins. L. J. 852.

<sup>267</sup> *Newark Fire Ins. Co. v. Sammons*, 110 Ill. 166.



delivering the policy and collecting the premium, notwithstanding a provision that a broker procuring a policy or its renewal should be the agent of the insured in all transactions relating to the insurance. So where, at the time of making the application, the agent was acting as an insurance broker, although he had not been employed by the company prior thereto, he was held to be the agent of the insured in procuring the policy, and only the agent of the company to collect the premium and deliver the policy, and that the company would not be bound by notice to him of an encumbrance on the property or notice that it stood on leased ground.<sup>268</sup> It is held in New York<sup>269</sup> that there must be some evidence of an authorization, or some fact from which a fair inference of an authorization by the company might be deduced, to make an insurance broker the agent of the company. It is also declared that a broker who effects an insurance policy is the agent of both parties, and that an indorser might be charged by notice to him of abandonment.<sup>270</sup> And in Washington it is held that an insurance broker who is employed to place insurance is the agent of his employer, and not of the insurer, but where a person applies to an insurance company for a gross amount of insurance, without giving instructions to place any portion of such insurance with other companies, and receives thereafter from such company policies for the entire amount of the insurance, signed by several other companies, and indorsed with a statement that the company applied to is the agent of the companies issuing the policies, the company applied to must, for the purpose of defining the relative rights of the applicant and the insurers, be regarded as the agent of the latter, and not of the former.<sup>271</sup> It will be seen, therefore, that the decisions are far from unanimous. They, however, present two important questions for consideration, and these are, Was the

<sup>268</sup> *East Tex. Fire Ins. Co. v. Brown*, 82 Tex. 631; 18 S. W. Rep. 713.

<sup>269</sup> *Allen v. German-American Ins. Co.*, 123 N. Y. 6; 33 St. R. 216; 25 N. E. Rep. 309.

<sup>270</sup> *Crousillat v. Ball*, 3 Yeates (Pa.), 375; 4 Dall. 294; 2 Am. Dec. 375.

<sup>271</sup> *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. (O. C.) 524; 34 Am. St. Rep. 87.

broker, at the time of effecting the insurance, acting for himself, independently of any employment by the company; or was he then ostensibly or actually connected with the company and employed by it? The determination of these facts must be of weight in arriving at a conclusion upon the question as to whose agent he was, and this distinction was made by the court in one of the cases above noted.<sup>272</sup> We believe that the inquiry should, in addition to the distinction just made, resolve itself into these questions: 1. From whom did the broker's express or implied authority to do the act relied on originally proceed? 2. Was the act one which the broker was expressly authorized to do, or did it arise as a usual and necessary means to accomplish the execution of the authority conferred? 3. Was the act done independently of the original employment, and if so, for whom or at whose instance? 4. Which party could the broker hold directly responsible for his remuneration at the time the act in question was done? 5. Was there any limitation upon the broker's ostensible authority of which the person dealing with him was, or ought to have been, cognizant? 6. Was there any ratification by the ostensible principal of the claimed unauthorized act?

**§ 415. Partnership as Agent—Joint Agents.**—One of a firm of insurance agents has all the powers of the firm in effecting insurances, and one partner may execute the agency for the firm.<sup>273</sup> Where one D. was the ostensible and commissioned agent of the company, and he and one L. were in partnership in the business of soliciting insurances, and L., with the consent of D., acted as the company's agent in procuring an application, which fact the company knew, but did not disapprove, and a joint commission had been promised to these two as the company's agents, which was delayed, but finally issued before the policy was delivered, it was held that L. was the company's agent.<sup>274</sup> But in case of dissolution of the partnership by death or otherwise, and the assured has knowledge

<sup>272</sup> *Arff. v. Starr F. Ins. Co.* (N. Y.), 57; 25 N. E. Rep. 1073.

<sup>273</sup> *Kennebec Co. v. Augusta Ins. Co.*, 6 Gray (72 Mass.), 204.

<sup>274</sup> *Van Schalck v. Niagara Fire Ins. Co.*, 68 N. Y. 434.

thereof, he is obligated at his peril to ascertain the extent of the authority of the surviving partner or partners,<sup>275</sup> although a power given to several to jointly and severally sign policies in their discretion, may, after the death of a part of the number, be executed by a part of the survivors, where such appears to be the intent of the instrument.<sup>276</sup>

**§ 416. Powers of Adjuster.**—An adjuster may occupy such a relation to the company, either by virtue of a long-continued employment and his long-continued custom in relation to the conduct of certain matters, that his acts will bind the company, as in case of his statement of the insurer's grounds for refusing to adjust a loss whereby a waiver may arise.<sup>277</sup> And although an adjuster may not be a general agent with power to settle losses finally, yet if he is authorized

<sup>275</sup> *Martine v. International etc. Ins. Co.*, 62 Barb. (N. Y.) 181.

<sup>276</sup> *Guthrie v. Armstrong*, 1 Dowl. & R. 248.

<sup>277</sup> *Rockford Ins. Co. v. Williams*, 56 Ill. App. 338. The court said in this case: "It is contended that Dolan did not sustain such a relation to the defendant as authorized him to speak for it on that subject, so as to make a refusal to pay on the ground stated a waiver of other grounds. The evidence was that Dolan had been in the employ of the defendant for about twenty years. He was working on a salary as agent of defendants, looking after agents, visiting them, making contracts with them, looking over their accounts, adjusting losses, and making collections, etc. He had adjusted a great many losses covering a good many years. He had cards for use furnished by defendant, on which he was designated as special agent and adjuster for defendant. The method adopted to set him to work as adjuster in any case, was to send him notice of the loss on a printed blank prepared by defendant, and in this case such a notice was sent him on the usual blank, and he went to Watseka in pursuance of it, and investigated the title to the property in question. He found the mortgage which apparently rendered the policy void, and made his report to defendant of that fact, and did nothing further in the matter. It seems that he was an adjuster of defendant, and had been engaged as such in this matter. We think that his statement of defendant's ground for refusal to adjust the loss would bind defendant," per Cartwright, J. See *Anthony v. German-American Ins. Co.*, 48 Mo. App. 65 (case where after notice of loss by local agent adjuster was wired to give prompt attention, and shortly thereafter appeared and made effort to settle). See, also, *Ætna Ins. Co. v. Shryer*, 86 Ind. 362.

by the corporation to carry blanks to prepare proofs, the jury may be warranted in finding an agency for such purpose, and may extend the time within which such proof could be formally made, and make such time dependent upon his own convenience in preparing the same.<sup>278</sup> But an offer to compromise a loss for half the amount due on a policy of insurance made by a general adjuster, without authority to waive or alter any of the terms of policies, is not such an exercise of authority as will bind the company, and constitute of itself a waiver of the right to forfeit the policy for breach of condition.<sup>279</sup> A refusal of an adjuster to settle because of his doubts as to the cause of the fire may operate to bind the company as a waiver of proofs.<sup>280</sup> If by the conditions of the policy the assured may be required to submit to an examination under oath, and an adjuster, claiming to represent the company, conducts such examination apparently for them, and subsequently writes to assured in relation thereto upon one of the company's letter-heads, wherein he is advertised as adjuster, it may be properly found that he is the insurer's agent.<sup>281</sup> A professional adjuster who, by reason of his technical skill and knowledge is employed generally by any and all companies as they may need him, has a right to follow his business wherever he may deem it necessary, and the fact that he goes to another state to adjust a loss there, at the request and under the employment of an unlicensed foreign company, does not make him its agent, and subject to a penalty under a statute prescribing a penalty on agents of unlicensed foreign companies adjusting losses in the state.<sup>282</sup>

<sup>278</sup> *Searle v. Dwelling-House Ins. Co.*, 152 Mass. 263.

<sup>279</sup> *Richards v. Continental Ins. Co.*, 83 Mich. 508; 21 Am. St. Rep. 611.

<sup>280</sup> *Mix v. Royal Ins. Co.*, 169 Pa. St. 639; 32 Atl. Rep. 460.

<sup>281</sup> *Enos v. St. Paul F. & M. Ins. Co.*, 4 S. Dak. 639; 57 N. W. Rep. 919.

<sup>282</sup> *French v. People* (Col. 1895), 24 Ins. L. J. 678; 40 Pac. Rep. 463. The court said in this case: "Appellant was not the agent of the Chicago company. By reason of his technical knowledge and ability in his particular department he was employed by any and all companies needing him. The calling with him was his business and profession, being a legal business. He had a right to follow it in any  
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An authority to adjust a loss occurring on the British coast cannot be presumed from the fact that the agents in Boston of a British company were authorized to issue policies, receive the premiums, and represent the principal in legal proceedings in Massachusetts.<sup>283</sup>

state where his employment called him—a right declared and guaranteed by the constitution of the United States; and any law abridging or restricting that right would be void," per Reed, P. J., citing numerous cases on the general proposition as to legislative power and limitations, and citing on the point that appellant was not the agent of the Chicago company for any purpose within the statute; *Weed v. Insurance Co.*, 116 N. Y. 106; 22 N. E. Rep. 229; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Pechner v. Insurance Co.*, 65 N. Y. 207; *Marvin v. Life Ins. Co.*, 85 N. Y. 283; *People v. Gilbert*, 44 Hun (N. Y.), 522.

<sup>283</sup> *Monroe v. British etc. Ins. Co.*, 3 U. S. O. C. A. 280; 5 U. S. App. 179; 52 Fed. Rep. 777.

## CHAPTER XVIII.

### AGENTS OF INSURER CONTINUED—POWERS.

- § 424. Powers of agents—Generally.
- § 425. Authority which the agent is held out to possess.
- § 426. Agent's authority is coextensive with his employment.
- § 427. Authority which the agent represents himself to possess.
- § 428. Private restrictions upon agent's authority.
- § 429. Assured bound by knowledge of limitations on agent's authority.
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- § 431. What is not notice of agent's limited authority.
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- § 436. That restrictions in policy on agent's powers only relate to acts after policy delivered.
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- § 439. Conclusion: Agent may waive conditions notwithstanding inhibition in policy.
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- § 446. Agency: Custom, etc.: Signing for principal.
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- § 463. Agent must have assumed to act for claimed principal.
- § 464. Ratification of acts: Other insurance.
- § 465. Power to bind company by contracts other than those of insurance.

§ 424. **Powers of Agents—Generally.**—As has been stated the business of insurance necessitates the employment of agents. Many elements enter into the determination of the extent of their powers. If limitations thereon are expressly made known to parties dealing with them, the question whether they exceed their authority is comparatively easy of ascertainment, which is not the case where the exact extent of the agent's authority must rest upon the uncertain quantity known and designated as his implied powers. It is said that an agent may bind his principal by all acts done by him within the apparent scope of his authority. This being true, the question at once arises, as to what is his apparent authority, and how ascertained. Each case must, in a large measure, rest upon its own peculiar facts and circumstances. General or local and particular custom or usage, or a course of business or dealing between the parties are frequently important factors. Whether the claimed exercise of authority relates to past or present or future conditions and matters connected with the policy, presents another element for consideration. What authority the principal expressly or impliedly represents the agent to possess, constitutes another factor in the solution of the question. And in case of corporations or associations, the charter or articles of association must be looked to to determine the authority of its agents. Sometimes peculiar or extraor-

dinary circumstances may necessitate and warrant an immediate and justifiable exercise of authority by an agent, which will in consequence be upheld, or a ratification of an agent's act may operate retrospectively. So the character of the agency may affect the question of an agent's powers. These and other elements, which enter into the determination of this question, will be noted in the following sections as far as the cases on insurance warrant. So it is held that a general agent has authority to waive payment in cash of premiums and of any conditions except when a restriction upon his authority is brought to the knowledge of insured.<sup>1</sup> These points are, however, more fully considered elsewhere.

**§ 425. Authority Which the Agent is Held out to Possess.**—The authority of an agent of the assurer must depend, in a large measure, upon the authority which those dealing with him are justified from the acts or omissions of the principal in believing him to possess. The question is not so much, what powers did the agent actually possess—it is the agent's ostensible or apparent authority, that which he is held out to the world to possess, which is the test of his actual powers in the absence of knowledge of limitations thereon on the part of persons dealing with such agent.<sup>2</sup> And the tendency of the courts at the present day is toward a liberal,

<sup>1</sup> *Machine Co. v. Insurance Co.*, 50 Ohio St. 558; 35 N. E. Rep. 1060, per Williams, J. That insurer is bound by acts of agent after revocation of authority, see *Burlington Ins. Co. v. Threlkeld*, 60 Ark. 539.

<sup>2</sup> *Farmers' Ins. Co. v. Chestnut*, 50 Ill. 111; 99 Am. Dec. 492; *Electric L. Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Franklin v. Atlantic Ins. Co.*, 42 Mo. 456; *Lightbody v. North America Ins. Co.*, 23 Wend. (N. Y.) 18; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Hatch v. Taylor*, 10 N. H. 538; *Kausal v. Minnesota Farmers' etc. Assn.*, 31 Minn. 17; 47 Am. Rep. 776, per Mitchell, J.; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 528, 529; *Beebe v. Hartford etc. Ins. Co.*, 25 Conn. 51. See *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465, 477. A circular issued by the company may be admitted in evidence to show that the company held its agent out as authorized to write policies covering certain risks: *Frank v. Pacific Mut. L. Ins. Co. of Cal.*, 44 Neb. 320; 62 N. W. Rep. 454; 24 Ins. L. J. 538.



rather than a strict, construction of an agent's powers.<sup>2</sup> The fact that the agent's appointment is by a written instrument cannot affect this rule where its terms are unknown to those dealing with him,<sup>4</sup> and the rule has been extended to cover such acts of the agent as are within the scope of such authority as the assured was justified, by the company's acts, in believing him to possess.<sup>5</sup> So that an insurance company is bound by the acts of its agents within the real or apparent scope of his authority,<sup>6</sup> and, to this extent, the act of the agent is that of his principal.<sup>7</sup> And this is so, even though he violates limitations upon that authority which are not brought home to the knowledge of the party with whom he deals,<sup>8</sup> and even though the agent's acts be in direct violation of his instructions.<sup>9</sup> So an insurance company is bound by the acts and declarations of a local agent within the scope of his employment.<sup>10</sup> The authority of a soliciting agent of an insurance company, to take applications for insurance, carries with it the legal implication of an authority to fill up the appli-

<sup>2</sup> See *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Ætna Ins. Co. v. Maguire*, 51 Ill. 342.

<sup>4</sup> *Farmers' etc. Ins. Co. v. Chestnut*, 50 Ill. 111; 99 Am. Dec. 492.

<sup>5</sup> *Franklin Ins. Co. v. Murray*, 73 Pa. St. 13; *Insurance Co. v. Wilkinson*, 13 Wall. 222, 234, per Miller, J.; *Kausal v. Minnesota Framers' etc. Assn.*, 31 Minn. 17; 47 Am. Rep. 776, per the Court.

<sup>6</sup> *Lingenfetter v. Phoenix Ins. Co.*, 19 Mo. App. 252; *Beebe v. Hartford Ins. Co.*, 25 Conn. 51; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83.

<sup>7</sup> *Clark v. Manufacturers' Ins. Co.*, 2 Wood. & M. (C. C.) 431, per Woodbury, J.; 8 How. (U. S.) 235; *New York Cent. Ins. Co. v. National Ins. Co.*, 20 Barb. 476; 15 N. Y. 85.

<sup>8</sup> *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83. See *Gloucester Mfg. Co. v. Howard F. Ins. Co.*, 5 Gray (Mass.), 497; 66 Am. Dec. 376; *Beebe v. Hartford Ins. Co.*, 25 Conn. 51; *Barnard v. Wheeler*, 24 Me. 412, 418.

<sup>9</sup> *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415.

<sup>10</sup> "An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal": *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222, per Miller, J. See *Continental Ins. Co. v. Kasey*, 25 Gratt. (Va.) 268; 18 Am. Rep. 681; *Smith v. Niagara F. Ins. Co.*, 60 Vt. 682; 15 Atl. Rep. 353, per Taft, J.

cation, and to do all things needful in perfecting it.<sup>11</sup> For if insurance companies clothe their agents with apparent authority to represent them in all matters in procuring the application, they are their agents in all that legally concerns it.<sup>12</sup> So a person may bind an insurance company by his acts as general agent, where he is held out as such by the company in the community where he does business, provided limitations on his powers are unknown to those dealing with such agent.<sup>13</sup> If the agent is authorized to issue policies of insurance, and consummate the contract, he can bind his principal by any act, agreement, representation, or waiver, within the ordinary scope and limit of the insurance business, which is not known by the assured to be outside the authority granted to the agent.<sup>14</sup> And where an agent has general authority to effect contracts of insurance to carry on the business at his agency, and to do all necessary and proper things in the prosecution thereof, it follows, as a necessary incident of such authority, that he has power to fix rates of premium, to give consent to the increase of risks, and change of occupation of buildings insured, to cancel policies on account of increase of risks, and to exercise supervision over the property covered by policies issued at his agency. Such implied authority is, however, subject to limitations imposed by his principals and known to those with whom he deals.<sup>15</sup> But it is held that a general agent of a life insurance company has no authority to issue a policy to a physician, under an

<sup>11</sup> *Combs v. Hannibal S. & I. Co.*, 43 Mo. 148; 97 Am. Dec. 383.

<sup>12</sup> *Rowley v. Insurance Co.*, 36 N. Y. 550, 553. See *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222, per Miller, J.

<sup>13</sup> *Western Home Ins. Co. v. Hogue*, 41 Kan. 524; 21 Pac. Rep. 641.

<sup>14</sup> *Insurance Co. v. McLanathan*, 11 Kan. 533. See *Rowley v. Empire F. Ins. Co.*, 36 N. Y. 550; *Marcus v. St. Louis Ins. Co.*, 68 N. Y. 625; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *National Mut. F. Ins. Co. v. Barnes*, 41 Kan. 161; 21 Pac. Rep. 165; *Gloucester Mfg. Co. v. Howard F. Ins. Co.*, 5 Gray (Mass.), 497; 66 Am. Dec. 376; *Benson v. Ottawa Agr. Ins. Co.*, 42 U. C. Q. B. 282. Examine *Hartford F. Ins. Co. v. Webster*, 69 Ill. 392.

<sup>15</sup> *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83. See *Imperial F. Ins. Co. v. Murray*, 73 Pa. St. 13; *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun, 9; *Mentz v. Lancaster F. Ins. Co.*, 79 Pa. St. 476. See cases in last note.

agreement that he pay a certain annual premium for a term of years, and that he shall be employed as examining physician and his services be paid by the premium.<sup>16</sup>

**§ 426. Agent's Authority is Coextensive with his Employment.**—An agent's authority is *prima facie* coextensive with the business intrusted to his care,<sup>17</sup> and this is especially true of insurance companies which do business by agencies at a distance from their principal office.<sup>18</sup> So that the known character of the employment, or the nature of the business, is of great weight in determining the scope of the agent's authority,<sup>19</sup> and the rule is, that an agent has authority to adopt the ordinary means and pursue the course necessitated by the business he is employed in to undertake, and which is necessary to accomplish the objects intended.<sup>20</sup> And not only this, but the company is also bound by the agent's acts, done within the limits of whatever authority may reasonably be presumed by the public to exist, by reason of such business, and the general manner of transacting it.<sup>21</sup>

**§ 427. Authority Which the Agent Represents Himself to Possess.**—If a person acts openly and notoriously

<sup>16</sup> *Anchor L. Ins. Co. v. Pease*, 44 How. Pr. (N. Y.) 385; 66 Barb. (N. Y.) 360. See *Fried v. Royal Ins. Co.*, 50 N. Y. 243. For cases of implied powers of agents, see *Maryland F. Ins. Co. v. Gersdorf*, 43 Md. 506; *Commonwealth v. Mechanics' Mut. F. Ins. Co.*, 120 Mass. 495; *Chase v. Hamilton etc. Ins. Co.*, 22 Barb. (N. Y.) 527; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Train v. Holland Purchase Ins. Co.*, 62 N. Y. 598; *Carter v. Cotton States L. Ins. Co.*, 56 Ga. 237; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180.

<sup>17</sup> *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222, 235, per Miller, J.; *Marrin v. Insurance Co.*, 85 N. Y. 283; *Weed v. London etc. Ins. Co.*, 116 N. Y. 106, 117; 22 N. E. Rep. 229, per Brown, J.

<sup>18</sup> *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 235.

<sup>19</sup> See *Insurance Co. v. Edwards*, 122 U. S. 457; *Markey v. Mutual B. L. Ins. Co.*, 103 Mass. 78.

<sup>20</sup> *Abraham v. Insurance Co.*, 40 Fed. Rep. 717, 720, 721, per Shiras, J.

<sup>21</sup> *Kenton Ins. Co. v. Shea*, 6 Bush (Ky.), 174; 99 Am. Dec. 676. See *Insurance Co. v. Wilkinson*, 13 Wall. 222, per the Court; *Kausal v. Minnesota Farmers' etc. Assn.*, 31 Minn. 17; 47 Am. Rep. 776, per the Court.

in exercising the duties of a particular agency, and under such circumstances as imply knowledge of the company, the presumption attaches that he has the authority he thus claims to possess,<sup>22</sup> for it is immaterial, so far as an agent's dealings with third persons are concerned, whether he acts by the direction and request of the principal, or by his permission merely. He is equally an agent in both cases.<sup>23</sup> But it must not be understood from this rule, that an agency can be created by the mere representations of a person claiming to act as agent, for it cannot.<sup>24</sup> It is no defense that the general agent departed from private instructions when acting within the general scope of his authority.<sup>24a</sup> The question is, what power third persons had a right to suppose he possessed, judging from his acts, and those of his principals.<sup>25</sup> Nor can agency be proven by the fact alone that one is "acting" for another,<sup>26</sup> nor by general reputation,<sup>27</sup> nor are the declarations of an agent evidence of his authority.<sup>28</sup> In *Perkins v. Washington Insurance Company*<sup>28a</sup> a person was appointed as a surveyor of an insurance company, and received in a letter from the president thereof his appointment, and also printed proposals of the company. From these the agent framed and published an advertisement to which he put the names of the president and secretary, and his own name as agent, and thereby solicited insurances through himself for the company. This advertisement was unauthorized by the principal, nor did it

<sup>22</sup> *Indiana B. & W. Ry. Co. v. Adamson*, 114 Ind. 282; 15 N. E. Rep. 5; *Singer Mfg. Co. v. Holdfodt*, 86 Ill. 455; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; *Lungstrass v. German Ins. Co.*, 57 Mo. 107.

<sup>23</sup> *Fay v. Richmond Ins. Co.*, 43 Vt. 25, 28, per Peck, J.; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; 6 Johns. Ch. (N. Y.) 485.

<sup>24</sup> *Marvin v. Wilbur*, 52 N. Y. 270; *Grover etc. Co. v. Polhemus*, 34 Mich. 247; *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 315; 3 Keyes (N. Y.). 230; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Lightbody v. North America Ins. Co.*, 23 Wend. (N. Y.) 22, per Bronson, J.

<sup>24a</sup> *Id.*

<sup>25</sup> On last point see, also, *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645; 6 Johns. Ch. (N. Y.) 485.

<sup>26</sup> *Walsh v. St. Paul Trust Co.*, 39 Minn. 23; 38 N. W. Rep. 631.

<sup>27</sup> *Graves v. Horton*, 38 Minn. 66; 35 N. W. Rep. 568.

<sup>28</sup> *James v. Stookey*, 1 Wash. C. C. (U. S.) 330.

<sup>28a</sup> 4 Cow. (N. Y.) 645; 6 Johns. Ch. (N. Y.) 485.

appear that it had knowledge thereof till the trial. The proposals sent by the company, and the letter of the president, were hung up in his place of business by the agent. The agent had several times agreed to insurances, and the premiums were forwarded, and the company had confirmed the agent's acts. The same thing was done in this case, and the agent had fixed the rate of premium. A bill in equity was brought to compel the issue of a policy, or the payment of the loss, and payment was decreed.<sup>29</sup> Again if an officer of a corporation acts publicly as such, in the management of the corporation's affairs, a due appointment is presumed.<sup>30</sup> So where the secretary of an insurance company gave his consent to the assignment of a policy, it was held that his authority must be presumed.<sup>31</sup> But it is no defense to an action on an insurance policy, that the insured agreed upon a compromise with a person who represented himself as authorized to act for the several companies in which the property was insured, but who was only a general agent and adjuster for one company, and whose settlement one of the companies did not act upon, by tendering its proportion of the amount to be paid, until after action brought,<sup>32</sup> and where a broker represented himself to the insured as the agent of a certain company, and the policy was issued and accepted by the insured, who paid the premium to the broker, who never transmitted it to the company, it was held that the insured was justified in assuming that the broker was an agent of the company, and that the latter could not avail itself of the defense of nonpayment of the premium.<sup>33</sup> So an insurance com-

<sup>29</sup> See, also, *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 31 Conn. 518; *Lightbody v. North American Ins. Co.*, 23 Wend. (N. Y.) 18.

<sup>30</sup> *Bank of United States v. Danbridge*, 12 Wheat. (U. S.) 89, per Story J. See *Merchants' Bank v. State Bank*, 10 Wall. (U. S.) 644; *Clark v. Benton Mfg. Co.*, 15 Wend. (N. Y.) 256.

<sup>31</sup> *Conover v. Mutual Ins. Co.*, 1 Comst. (1 N. Y.) 290; 3 Denio (N. Y.), 254.

<sup>32</sup> *Luce v. Springfield F. & M. Ins. Co.*, 1 Flap. (C. C.) 282, per Withey, J.

<sup>33</sup> *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 545. Examine *Germania F. Ins. Co. v. McKee*, 94 Ill. 194.

pany is bound by a policy issued by an agent for a particular city, though the property insured is in another city where the company had another agent, if the agent issuing the policy claims to have authority, and the fact of the existence of the other agency is not known to the assured.<sup>84</sup>

**§ 428. Private Restrictions upon Agent's Authority.**

It is well settled that the rights of innocent third parties, dealing with an agent within the apparent scope of his authority, cannot be affected by private instructions to such agent, or secret limitations upon his authority,<sup>85</sup> unless such instructions be made public or the insured has notice, or unless the party dealing with the agent is, by reason of the attendant circumstances, or something in the nature of the business, or by custom or by a course of dealing or otherwise, put upon inquiry as to the exact limits of the agent's authority.<sup>86</sup> For the powers of an agent cannot be narrowed by limitations thereon not communicated to parties with whom he deals, and who rely in good faith upon his apparent authority.<sup>87</sup> So secret instructions are not binding where an agent is authorized to solicit insurance, and is provided with applications, policies, and necessary blanks, and accepts the application, receives the pre-

<sup>84</sup> *Lightbody v. North America Ins. Co.*, 23 Wend. (N. Y.) 18. See *Ætna Ins. Co. v. Maguire*, 51 Ill. 342.

<sup>85</sup> *Connecticut etc. Ins. Co. v. State ex rel.*, 113 Ind. 331, \*337; *Walsh v. Tayler*, 10 N. H. 538; *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62; *Commercial Ins. Co. v. State*, 113 Ind. 331; 4 Ind. (L. ed.) 449; 13 West. Rep. 47; *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645, per Colder, Sen.; *Rivara v. Queen's Ins. Co.*, 62 Miss. 720; *Howard Ins. Co. v. Owen*, 94 Ky. 197; 13 Ky. L. Rep. 237; *Ruzgles v. American Cent. Ins. Co.*, 114 N. Y. 421; *Queen Ins. Co. v. Young*, 86 Ala. 424; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222, per Miller, J.; *Southern L. Ins. Co. v. McCain*, 96 U. S. 84; *Mechem on Agency*, ed. 1889, sec. 279.

<sup>86</sup> *Connecticut etc. Ins. Co. v. State ex rel.*, 113 Ind. 331, 337; *Markey v. Mutual B. L. Ins. Co.*, 103 Mass. 82, 87, 93; *United States L. Ins. Co. v. Advance Co.*, 80 Ill. 549; *Kenton Ins. Co. v. Shea*, 6 Bush (Ky.), 174; 93 Am. Dec. 676; *Breckinridge v. American Cent. Ins. Co.*, 87 Mo. 62.

<sup>87</sup> See *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222, per Miller, J., and cases under first note to this section.

mium, and executes and delivers the policy,<sup>38</sup> and a person is not bound by secret instructions to a general agent.<sup>39</sup> And it is held that any limitation upon the authority of the agent of a foreign life insurance company must be brought home to the knowledge of the beneficiary, in order to invalidate his claim.<sup>40</sup> If an officer of an insurance company assumes to possess certain powers, and the nature of his employment justifies the assumption of authority, and the party dealing with him has no notice of want of the claimed authority, and there is nothing to warrant an inference to the contrary, the company is bound, even though he had no such power as claimed.<sup>41</sup> And where an agent issued a policy after his authority so to do had expired, and he notified the company, which immediately directed him to cancel and return the policy, which was not done till after loss by fire, it was held that such instructions, being unknown to the insured, could not affect his rights.<sup>42</sup> And again where the directors of an insurance company has instructed the agent not to insure distillers, a policy on a distillery will nevertheless be valid, where the insured had no knowledge of such inhibition.<sup>43</sup> So an agent, supplied with policies signed in blank, may contract to renew at a stated period, and thereby render the company liable for a loss, notwithstanding private instructions limiting his authority.<sup>44</sup> And the fact that an insurance agent has instructions from his principal, to take only a limited amount of insurance in a specified place, cannot affect the rights of a party insured, unless he had notice of such fact.<sup>45</sup> So where the

<sup>38</sup> *American Employers' Liability Co. v. Barr* (U. S. C. C. A., 8th Cir., 1895), 68 Fed. Rep. 873; 16 U. S. C. C. A. 51.

<sup>39</sup> *Commercial F. Ins. Co. v. Morris* (Ala. 1895), 18 S. Rep. 31.

<sup>40</sup> *Mowry v. Home L. Ins. Co.*, 9 R. I. 346.

<sup>41</sup> *Lungstraas v. German Ins. Co.*, 57 Mo. 107. See *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Fayles v. National Ins. Co.*, 49 Mo. 380; *Farmers' etc. Ins. Co. v. Chestnut*, 50 Ill. 111; 99 Am. Dec. 492.

<sup>42</sup> *Watertown F. Ins. Co. v. Rust*, 141 Ill. 85; 30 N. E. Rep. 772.

<sup>43</sup> *Citizens' Mut. F. Ins. Co. v. Sortwell*, 8 Allen (90 Mass.), 217.

<sup>44</sup> *Bambie v. Ætna Ins. Co.*, 2 Dill. (C. C.) 156.

<sup>45</sup> *Hartford F. Ins. Co. v. Farrish*, 73 Ill. 166.

general agent of an insurance company received a policy taken by a local agent, and acquiesced in the risk, although taken outside the locality for which the local agent was appointed, the company cannot be permitted afterward to allege the want of authority in the local agent.<sup>46</sup> And it is held in New York that an agent may effect insurance outside of the limits prescribed by private instructions, where the limitation upon his authority is unknown to the assured.<sup>47</sup>

**§ 429. Assured Bound by Knowledge of Limitations upon Agent's Authority.**—Where parties dealing with an agent have knowledge of the extent of his authority they are bound thereby and cannot claim the benefit of any acts, declarations, or representations of the agent, done or made in excess of his known powers. Such knowledge may arise from an express or implied notice of restrictions upon the agent's authority, or it may exist where the circumstances are such as to put such parties upon inquiry. It may also arise from a custom or course of dealing governing negotiations or transactions between the parties.<sup>48</sup> So where it is well known that the authority of an agent is limited to underwriting marine risks to an amount not exceeding a certain sum, the company is not bound where such agent underwrites a policy for a larger risk.<sup>49</sup> And a custom of insurance companies to limit in marine risks the authority of their agents at the different ports by instructions, operates as a notice of their powers, and must control in cases relating thereto.<sup>50</sup> This rule refers to the custom

<sup>46</sup> *Aetna Ins. Co. v. Maguire*, 51 Ill. 342.

<sup>47</sup> *Lightbody v. North America Ins. Co.*, 23 Wend. (N. Y.) 18.

<sup>48</sup> See *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Baines v. Ewing*, 1 L. R. 1 Ex. 320; *Winnesheik v. Halzgrafe*, 53 Ill. 524; 5 Am. Rep. 70; *Vose v. Eagle Ins. Co.*, 6 Cush. (60 Mass.) 42; *Messereau v. Phoenix Ins. Co.*, 66 N. Y. 274; *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507; 96 Am. Dec. 65; *Galbraith v. Arlington etc. Ins. Co.*, 12 Bush (Ky.), 29; *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278; 39 Am. Rep. 657, 659.

<sup>49</sup> *Baines v. Ewing*, 1 L. R. Ex. 320; 4 Hurl. & C. 511.

<sup>50</sup> See 2 *Duer on Insurance*, ed. 1846, p. 351; 1 *Arnould on Marine Insurance*, Perkins' ed., 146, citing *Drake v. Marryatt*, 1 Barn. & C. 473.



that Lloyd's agents acted under instructions which limited their authority, but the principle underlying the rule is that an agent cannot do a binding act in excess of his known authority, and that such knowledge may well arise from the existence of a well-known custom. In case an agent is given authority merely to receive applications for insurance, in accordance with his instructions, and to collect and transmit the premium therefor, and to deliver the policies to the assured when issued, and the extent of his power is well understood, he has no authority to make a contract of insurance; nor, in such case, will the company be bound by his acts beyond the scope of his powers.<sup>51</sup> And a party who merely has possession of blanks issued by the company, and no written appointment from it, and whose want of authority is known to the applicant, has not power to bind the company to a contract for insurance by receiving payment of the premium.<sup>52</sup> So in a Wisconsin case it appeared that one B. was not in fact authorized to make contracts of insurance, but had power merely to receive and forward applications, deliver policies, and collect premiums thereon. The plaintiff knew that B. had no authority to issue the policy, but that it was to be issued by the general agent upon his approval of the application, and he took additional insurance in another company in consequence of the delay in receiving a policy from the defendant. There was no evidence that defendant ever held B. out as clothed with authority to take risks for it, or that it knew that he was acting beyond his authority. But it was shown that when B. took plaintiff's application no money was paid, though the understanding was, that the premium should be paid on the receipt and delivery of the policy; that B. then assured plaintiff that the insurance would take effect from the date of the application; that he was in fact authorized to make insurance to take effect from the time of the application, subject to the approval of the general

<sup>51</sup> *Armstrong v. State Ins. Co.*, 61 Iowa, 212; *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 524; 5 Am. Rep. 70.

<sup>52</sup> *More v. New York Bowery F. Ins. Co.*, 29 N. E. Rep. 757; 42 St. R. 543; 55 Hun (N. Y.), 540, reversed; 130 N. Y. 537.

agent, upon a certain class of property; that although the property here in question was not of that class, that plaintiff's insurance with defendant was valid. Plaintiff's risk was not accepted by the general agent, but was rejected by him after the property was burned, but before he had knowledge of the fact. In an action on the parol contract alleged to have been made, it was held that no recovery could be had.<sup>53</sup> It is held in Iowa that the insured is chargeable with knowledge as to the limitations upon a soliciting agent's authority, and of his inability to bind the company contrary to the conditions of the policy by statements made prior to the issue of the policy.<sup>54</sup> And where an attorney at law is employed by the company to collect a premium note, and informs the assured of his restricted authority, his acts in excess of such known limitations of power do not bind the company. Therefore he cannot alter a contract of insurance nor waive a forfeiture.<sup>55</sup> So an agent has no power to change the contract either by parol or otherwise, where the insured has actual knowledge of an express limitation in the policy on the agent's powers.<sup>56</sup> Again it is held that if one has power only to receive and forward applications, and the applicant knows or is bound to know this, and that the application signed by him was to be forwarded and submitted to the company, and formed the sole basis of the acceptance of the risk by the company, he must see that the statements and representations are not essentially untrue.<sup>57</sup> It is also held that bringing an action on an insurance policy, which contains limitations of the agent's authority, is conclusive evidence that the insured knew of and contracted with reference to such limitation.<sup>58</sup>

<sup>53</sup> *Fleming v. Hartford F. Ins. Co.*, 42 Wis. 616.

<sup>54</sup> *Dryer v. Security F. Ins. Co.* (Iowa, 1895), 62 N. W. Rep. 798; 24 Ins. L. J. 541.

<sup>55</sup> *Continental Ins. Co. v. Cooras* (Ky. Sup. Ct. 1892), 14 Ky. L. Rep. 110.

<sup>56</sup> *Weidert v. State Ins. Co.*, 19 Or. 261; 19 Ins. L. J. 740; 24 Pac. Rep. 242.

<sup>57</sup> *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507; 96 Am. Dec. 65.

<sup>58</sup> *Hill v. London Assur. Corp.*, 34 N. Y. St. Rep. 65; 12 N. Y. Supp. 86.

**§ 430. Obligation to Inquire as to Agent's Authority.**

As a general rule an obligation rests upon a person dealing with an agent known to be acting under an express or special authority to ascertain the limits of his authority to act for and bind his principal.<sup>59</sup> And so in case of a special agent, whether the authority be written or verbal, the party dealing with him is bound to inquire into the nature and extent of the agent's authority, for the principal cannot be bound without or beyond the authority delegated by him.<sup>60</sup> And in case of such special agent, if the assured neglects to make such inquiries as are necessitated by the circumstances, he is nevertheless bound by the knowledge of the agent's limited powers which such inquiry would have disclosed. The above rule is not, however, inflexible, for there are important exceptions thereto, and in cases where such exceptions exist, it must appear that the party had actual knowledge that the agent was exceeding his powers;<sup>61</sup> for third persons cannot be affected by limitations upon an agent's authority, where the principal has so acted, or permitted the agent so

<sup>59</sup> Mechem on Agency, ed. 1889, secs. 273, 276, 289-91; Story on Agency, sec. 58, and note; *Baxter v. Lamont*, 60 Ill. 237; *Harrison v. City F. Ins. Co.*, 9 Allen (Mass.), 233; 85 Am. Dec. 751; *Payne v. Potter*, 9 Iowa, 547; 2 Duer on Insurance, ed. 1846, p. 346.

<sup>60</sup> *Equitable L. Ins. Soc. v. Poe*, 53 Md. 34; 9 Ins. L. J. 871; Mechem on Agency, ed. 1889, sec. 288. See Ewell's *Evans on Agency*, 134-40, side pp. 101-7, as to distinctions between the general and special agent, and obligation to inquire as to the extent of the latter's authority; Story on Agency, 2d ed. 73-133. As to implied powers and nature and extent of incidental authority, see *Huntley v. Mathias*, 90 N. C. 101; 47 Am. Rep. 516, and note, 518; Mechem on Agency, ed. 1889, sec. 285.

<sup>61</sup> "But it is not in all cases that the obligation to inquire exists. There are important exceptions to the general rule, and in the excepted cases, in order to avoid the contract of the agent who has exceeded his powers, the actual knowledge of the party with whom the contract was made is necessary to be proved": 2 Duer on Insurance, ed. 1846, 346. Where the agent is a special agent "the assured must at his peril know whether the act relied on is within the scope of his real or of his apparent authority. He is bound to know when he has passed the precise limits of his power, and cannot rely upon the assumption of authority by the agent to do an act beyond the scope of his actual authority, real or apparent": 2 Wood on Fire Insurance, 2d ed., p. 873, sec. 421. See, also, Story on Agency, sec. 133.

to act, as to justify a belief that the agent had general or unlimited authority,<sup>62</sup> and the insured has a right to assume that the agent possesses the power to do all acts necessary to effect the purposes which the apparent scope of his authority warrants, as where an agent has possession of blank policies or renewal receipts.<sup>63</sup> But an agent authorized to adjust a particular loss cannot adjust a different loss.<sup>64</sup> Nor is a bare authority to make a contract of insurance sufficient to warrant a cancellation thereof.<sup>65</sup> So if an agent's authority is apparently limited, one dealing with him is bound to inquire concerning the extent of said authority before trusting it.<sup>66</sup> And since one who is a member of a mutual insurance company is presumed to have knowledge of its charter and by-laws, he cannot be considered a stranger to the powers committed to the local agents of the company under its rules.<sup>67</sup> So where an agent's employment is such as to indicate limited powers, it is held that those dealing with such special agent are put upon inquiry as to the extent of his authority.<sup>68</sup> It is also held in Colorado that an applicant for fire insurance through a soliciting agent is obligated to ascertain the scope of such agent's

<sup>62</sup> *Keenan v. Missouri State Ins. Co.*, 12 Iowa, 126. "But the scope and extent of his powers must be determined by his actual authority, or by his acts and the recognition thereof by his principal. The insured has no right to infer authority in the agent farther than he is justified in doing so from the nature and requirements of the business intrusted to him, and what he has previously done in the prosecution thereof with the assent of the insurers, express or implied": 2 Wood on Fire Insurance, 2d ed., p. 873, sec. 421.

<sup>63</sup> See, generally, *Gloucester Mfg. Co. v. Howard F. Ins. Co.*, 5 Gray (Mass.), 497; 66 Am. Dec. 376; *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292; *Bambie v. Aetna Ins. Co.*, 2 Dill. (C. C.) 156; *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun (N. Y.), 90, and cases throughout this chapter.

<sup>64</sup> *Hartford F. Ins. Co. v. Smith*, 3 Col. 422.

<sup>65</sup> *Stilwell v. Mutual L. Ins. Co.*, 72 N. Y. 385.

<sup>66</sup> *Allen v. St. Lawrence Co. Farmers' Ins. Co.*, 88 Hun (N. Y.), 461; distinguishing *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402; *Van Loan v. Farmers' etc. Assn.*, 90 N. Y. 280.

<sup>67</sup> *Mitchell v. Lycoming etc. Ins. Co.*, 51 Pa. St. 402.

<sup>68</sup> *Bohart v. Oberne*, 38 Kan. 284. See *Beebe v. Equitable Mut. L. & E. Assn.*, 76 Iowa, 129; 40 N. W. Rep. 122.

authority.<sup>69</sup> So a form of counter-signature of a policy as "W. agent, per K.," may be sufficient to put the insured upon inquiry as to the extent of the agent's authority. But in such case the receipt of a circular by the company, stating that W. had formed a partnership with K., does not impose on the company any obligation to deny K's authority.<sup>70</sup> And third parties dealing with the officer of an insurance corporation are, as a general rule, charged with notice of whatever limitations are imposed upon their powers by the charter and by-laws.<sup>71</sup>

**§ 431. What is not Notice of Agent's Limited Authority.**

Exactly what does and does not constitute notice of an agent's limited authority, must necessarily depend upon individual cases and their attendant circumstances. Of course this does not cover cases of actual notice. If there is nothing in the application or the policy, and no actual notice is given to the applicant, evidence of instructions, and rules of a foreign mutual insurance company are inadmissible to prove limitations of the local agent's authority.<sup>72</sup> And where there was printed upon the back of a policy of life insurance a notice to the policy holders, that payment to agents would not be deemed valid, unless a receipt, signed by certain specified officers of the company was received at the time, such notice was held not to constitute a limitation of the power of a general agent, and that payment to him was valid without a receipt, and the company was also held to have waived whatever limitation such notice imported, where it authorized the agent, upon the termination

<sup>69</sup> *Sun Fire Office v. Wich* (Colo. 1895), 39 Pac. Rep. 587.

<sup>70</sup> *McClure v. Mississippi Valley Ins. Co.*, 4 Mo. App. 148.

<sup>71</sup> *Adriance v. Roome*, 52 Barb. (N. Y.) 399, 411, per Gilbert, J.

<sup>72</sup> *Markey v. Mutual B. etc. Ins. Co.*, 103 Mass. 78. Not charged with notice of special restrictions on authority of local agent authorized to solicit insurance, examine risks, deliver policies, collect premiums, grant special permits, and waive conditions in writing: *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 389; 66 Hun (N. Y.), 546; 59 N. Y. St. Rep. 777; 37 N. E. Rep. 615, two judges dissenting. The cases cited were *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Mersereau v. Phoenix Mut. L. Ins. Co.*, 66 N. Y. 278; *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; *Arff v. Starr F. Ins. Co.*, 125 N. Y. 57.

of his agency, and the return of receipts in his hands, to thereafter receive premiums without receipts.<sup>73</sup> If one is appointed as agent or surveyor the word "surveyor" does not limit the word "agent,"<sup>74</sup> and it is held that the mere fact that an application is forwarded by the agent to the home office for approval, does not charge the applicant with notice of the exact nature and limits of an agent's authority.<sup>75</sup>

**§ 432. Stipulation that only Certain Agents may Waive.**—If the policy stipulates that waiver of forfeitures can only be by certain officers, another agent cannot waive unless the company, subsequently to the execution of the contract, permits the waiver or gives such agent the requisite authority,<sup>76</sup> or unless there be a usage or course of business justifying the act.<sup>77</sup>

**§ 433. Limitation of Agent's Authority in Policy is Valid.**—It is undoubtedly within the power of the parties to stipulate that an agent's authority shall be exercised only within certain limits. It is equally true that an insurance company may validly, as between itself and its agent, define and limit his powers, and this will affect all third parties, dealing with an agent, who have knowledge or notice thereof.<sup>78</sup>

<sup>73</sup> *McNelly v. Continental L. Ins. Co.*, 66 N. Y. 23.

<sup>74</sup> *Lycoming F. Ins. Co. v. Woodworth*, 83 Pa. St. 223.

<sup>75</sup> *American Ins. Co. v. Gallatin*, 48 Wis. 36.

<sup>76</sup> So held in *Porter v. United States L. Ins. Co.*, 160 Mass. 183; 35 N. E. Rep. 678.

<sup>77</sup> *Stewart v. Mutual L. Ins. Co.*, 76 Hun (N. Y.), 267; 27 N. Y. Supp. 724; 59 N. Y. 118.

<sup>78</sup> See generally as to limitations on agent's power brought to notice of assured, *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5, 10; *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 32 N. W. Rep. 660; *Mersereau v. Phoenix Mut. L. Ins. Co.*, 66 N. Y. 274; *Clevenger v. Insurance Co.*, 2 Dak. 114; 3 N. W. Rep. 313; *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302, 308; 51 N. W. Rep. 455; 52 N. W. Rep. 754; *Leonard v. Insurance Co.*, 97 Ind. 306; *Whitehead v. Germania F. Ins. Co.*, 76 N. Y. 415; *New York L. Ins. Co. v. Fletcher*, 117 U. S. 531; distinguishing *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222, and *Insurance Co. v. Mahone*, 21 Wall. (U. S.) 152, where notice of limitation was not given assured; *O'Reilly v. Corporation of L. Assur.*, 101 N. Y. 575; 5 N. E. Rep. 568; *Kyte v. Assurance Co.*, 144 Mass. 43.

And an agent is bound by such instructions, and has no right to act upon his own judgment as to the expediency of such directions.<sup>79</sup> But it is decided that a provision that "no officer, agent, or representative" of the company, should be held to have waived any condition of the policy, unless such waiver should be indorsed thereon, not being a limitation on the authority of any particular agent, or class of agents, but in effect on the capacity of the corporation's future action, is invalid,<sup>80</sup> and an inhibition against taking risks on distilleries and steam saw mills, does not prohibit taking risks on buildings erected for such use, but not in use.<sup>81</sup>

**§ 434. Authorities Holding that Restrictions in Policy on Agent's Authority Bind Insured.**—There are numerous decisions which uphold the doctrine that restrictions in the policy upon an agent's authority are binding upon the assured, and operate as a notice to him of the extent of the agent's powers. Irrespective of the question whether such a rule conflicts with the weight of authority, there are undoubtedly many cases where the circumstances would well warrant such rulings. Some of the courts have held that such a limitation in the policy has the force of a stipulation, and therefore binds the parties agreeing thereto. Thus it is said, by the court in a Wisconsin case,<sup>82</sup> "We must hold that when the assured has accepted a policy containing a clause prohibiting the waiver of any of its provisions by the local agent, he is bound by such inhibition, and that any subsequently attempted waiver, merely by virtue of such agency, is a nullity." So it is held in a California case that where there is an express provision in the policy that statements not in the written application, nor indorsed on the policy, shall not bind the company, such condi-

<sup>79</sup> *Kraber v. Union Ins. Co.*, 129 Pa. St. 8; 24 Week. Nat. Cas. 547; 18 Atl. Rep. 491.

<sup>80</sup> *Lamberton v. Connecticut F. Ins. Co.*, 39 Minn. 129; 39 N. W. Rep. 78.

<sup>81</sup> *Ætna Ins. Co. v. Maguire*, 51 Ill. 342.

<sup>82</sup> *Hawkins v. Rockford Ins. Co.*, 70 Wis. 1; 35 N. W. Rep. 34.

tion binds the assured.<sup>83</sup> And in another case in that state it is determined that if the policy provides that the agent has no authority to waive except upon special authority in writing, such condition operates as a notice of limitation of the agent's powers.<sup>84</sup> So in a Michigan case<sup>85</sup> the policy provided against other insurance, and also that no agent should have power to waive or modify any of its conditions, and it was held that the agent's declarations, permitting further insurance, could not operate to estop the company from denying its liability for loss. Another decision in the same state holds that an agent cannot alter or vary the terms of a policy in the face of express inhibitory provisions.<sup>86</sup> In Kansas<sup>87</sup> it is asserted that if a policy has been executed and delivered to the assured, and has gone into full force and effect, he is presumed to take notice of, and to be bound generally by, restriction upon the agent's authority set forth upon the face of the policy. So in Oregon<sup>88</sup> it is held that the acceptance by the assured of a policy, containing an express limitation on an agent's powers, estops the assured from claiming, as against the assurer, the benefit of acts of the agent done in excess of such restricted authority. And similar rulings have been made in Pennsylvania,<sup>89</sup> in Missouri,<sup>90</sup> in Illinois,<sup>91</sup> in Iowa,<sup>92</sup> in Dakota,<sup>93</sup> and in New Jersey.<sup>94</sup> So in a New York case<sup>95</sup> the court holds that a restriction permitting a waiver only in

<sup>83</sup> *Enos v. Sun Ins. Co.*, 67 Cal. 621.

<sup>84</sup> *Shreggart v. Lycoming F. Ins. Co.*, 55 Cal. 408.

<sup>85</sup> *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527; 32 N. W. Rep. 660.

<sup>86</sup> *McIntyre v. Michigan State Ins. Co.*, 52 Mich. 188.

<sup>87</sup> *Burlington Ins. Co. v. Gibbons*, 43 Kan. 15; 22 Pac. Rep. 1010 (soliciting agent).

<sup>88</sup> *Weidert v. State Ins. Co.*, 19 Or. 261; 24 Pac. Rep. 242.

<sup>89</sup> *Greene v. Lycoming F. Ins. Co.*, 91 Pa. St. 387; 9 Ins. L. J. 811. See *Girard F. Ins. Co. v. Hebard*, 95 Pa. St. 45; *Kroeger v. Birmingham Ins. Co.*, 2 Norris (Pa.), 264; *Commonwealth Mut. F. Ins. Co. v. Hunzinger*, 98 Pa. St. 41.

<sup>90</sup> *Greenwood v. New York L. Ins. Co.*, 27 Mo. App. 401.

<sup>91</sup> *Equitable L. Ins. Co. v. Cooper*, 60 Ill. 509.

<sup>92</sup> *Zimmerman v. Home Ins. Co.*, 77 Iowa, 685; 42 N. W. Rep. 462.

<sup>93</sup> *Clevenger v. Mutual L. Ins. Co.*, 2 Dak. 114; 9 Ins. L. J. 129.

<sup>94</sup> *Catolr v. American etc. Ins. Co.*, 33 N. J. L. (4 Vroom) 487.

<sup>95</sup> *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5.



a specified manner operates as notice of the agent's limited authority. And it is held in the same state that a provision in the policy that an agent has no authority to collect premiums, except upon a renewal receipt signed by the president and secretary, is, in effect, a notice to the assured of the extent of the agent's powers.<sup>96</sup> It is also determined in that state that if the policy expressly stipulates that the agent has no power to make representations on his own responsibility, that his opinion given the assured, as to certain advantages of the company's plan, did not bind the latter, especially where a pamphlet setting forth the details of the plan is shown to the assured,<sup>97</sup> and as high an authority as the United States supreme court has held that where a general agent's authority to waive forfeitures or conditions as to non-payment of premiums is expressly limited by the policy, such limitation governs.<sup>98</sup> And in Canada we find substantially the same ruling.<sup>99</sup>

**§ 435. Restrictions in Policy as to the Manner of Exercising Authority by Agent.**—There is a class of cases which hold, in accordance with the principle of the decisions given under the last section, that where the policy provides that the agent has no authority to waive, except in a certain manner stated in the policy, or that only specified agents can waive the terms of the contract, such restriction binds the assured. Thus where the condition was that no waiver by any agent would be valid without a written indorsement of consent by the company, it was held that such indorsement was necessary to operate as a waiver of a forfeiture, notwithstanding the

<sup>96</sup> *Mersereau v. Phoenix Mut. L. Ins. Co.*, 66 N. Y. 274.

<sup>97</sup> *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.), 309.

<sup>98</sup> *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222. See *Insurance Co. v. Fletcher*, 117 U. S. 519.

<sup>99</sup> *Hendrickson v. Queen Ins. Co.*, 30 U. C. Q. B. 108; *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414; 39 N. W. Rep. 571 (case of additional insurance even though agent had authority to consent in a certain way thereto); *Worcester Bank v. Hartford F. Ins. Co.*, 11 Cush. (Mass.) 265; 59 Am. Dec. 145 (case of other insurance and agent said he would have it indorsed, but did not).

policy was given the agent to obtain the required consent, and the agent returned the policy with the statement that all proper formalities had been complied with.<sup>100</sup> So where the by-law of a mutual company required the consent of directors to certain acts, it was held that an agent could not bind the company by acts done otherwise.<sup>101</sup> And a local agent has no power to waive the conditions of a policy where it expressly provides that such waiver must be made by the secretary of the company, and such restriction in the policy is notice to the assured of the local agent's want of authority to make the waiver,<sup>102</sup> so where consent to other insurance is required to be indorsed on the policy by the company, a soliciting agent has no authority to waive such provision.<sup>103</sup> Nor can a local agent verbally waive proofs of loss, where the policy provides that a waiver must be in writing indorsed upon, or attached to, the policy, and this case also decides that it must be presumed that the insured had knowledge of such stipulation.<sup>104</sup> So an extension of the time of payment of premiums, contrary to the stipulations of the policy, which required any alteration or waiver to be made at the head office, and signed by an officer of the company is invalid, when made by a general agent at another place than that specified.<sup>105</sup> So where an agent, being informed that the premises were vacant, said it was all right since he had been notified, it was held that there was no waiver, as the policy provided that no waiver should be valid except it were made in writing and signed by the secretary.<sup>106</sup> Again,

<sup>100</sup> *Hill v. London Assur. Corp.*, 30 N. Y. 539; 9 N. Y. Supp. 500.

<sup>101</sup> *Behler v. German Mut. F. Ins. Co.*, 68 Ind. 347.

<sup>102</sup> *Wilkins v. State Ins. Co.*, 43 Minn. 177; 45 N. W. Rep. 1; *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 28; 45 St. R. 389; 31 N. E. Rep. 265; reversing 11 N. Y. Supp. 125. See, also, *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356; 31 N. E. Rep. 31; 45 St. R. 200; 21 Ins. L. J. 650.

<sup>103</sup> *Hartford F. Ins. Co. v. Small* (U. S. C. C. A., 5th Cir., 1895), 66 Fed. Rep. 490.

<sup>104</sup> *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302, 308; 51 N. W. Rep. 455.

<sup>105</sup> *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278; 39 Am. Rep. 657.

<sup>106</sup> *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 28; 31 N. E. Rep. 265.

where the condition was that only a written indorsed agreement should be valid as a waiver, such stipulation excludes an authorization of increase of risk in any other mode.<sup>107</sup> In the case of *Walsh v. Hartford Fire Insurance Company*,<sup>107a</sup> the court distinctly admits that the company can itself waive conditions by oral consent, although the policy requires a writing,<sup>108</sup> and that the agent, unless restricted, would possess equal power. The agent in that case had authority to solicit risks, receive applications for insurance, fix rates of premium, and issue and renew policies. But the court unequivocally held that such limitation in the policy could "mean nothing less than that agents shall not have power to waive conditions except in one mode, viz., by indorsement on the policy."<sup>109</sup> In a Vermont case it was held that the agent could waive proofs of loss only in the manner provided in the policy.<sup>110</sup> Substantially the same ruling has been made in Wisconsin.<sup>111</sup> So in Mississippi,<sup>112</sup> it is declared that an agent who is not authorized to issue policies, nor to alter them, cannot orally consent to additional insurance where the policy requires written consent.<sup>113</sup> So where an agent was informed of an encumbrance at the time of the application, and said it was "too trifling," it was decided that there was no waiver. In this case the charter of the company required an encumbrance to be expressed, and a memorandum was indorsed on the policy that the company would not be bound by any statement made to an agent not contained in the application.<sup>114</sup> And in a similar

<sup>107</sup> *Gladding v. California Farmers' etc. Ins. Co.*, 66 Cal. 6.

<sup>107a</sup> 73 N. Y. 5.

<sup>108</sup> *Citing Trustees etc. v. Brooklyn F. Ins. Co.*, 19 N. Y. 305.

<sup>109</sup> Three judges dissented. See *Hill v. London Assur. Soc.*, 26 Abb. N. C. (N. Y.) 203; 16 Daly (N. Y.), 120.

<sup>110</sup> *Smith v. Niagara F. Ins. Co.*, 60 Vt. 682; 1 L. R. Annot. 216 (powers of local agent and general agent distinguished.)

<sup>111</sup> *Knudson v. Hekla F. Ins. Co.*, 75 Wis. 198; 43 N. W. Rep. 954.

<sup>112</sup> *Liverpool, London & Globe Ins. Co. v. Sorsby*, 60 Miss. 302.

<sup>113</sup> See, also, *German Ins. Co. v. Heiduk*, 30 Neb. 288; 46 N. W. Rep. 481.

<sup>114</sup> *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247; 19 Mo. 628. To similar effect, see *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Insurance Co. v. Mowry*, 96 U. S. 544; *New York L. Ins. Co. v. Fletcher*, 117 N. Y. 519. But see *Emery v. Piscataqua etc. Ins. Co.*, 52 Me. 322.

case in New Jersey,<sup>115</sup> a like ruling was made, although the agent was a collecting agent, and there was no evidence that he possessed or had before attempted to waive forfeitures or revive a lapsed policy. So any course of action on the part of an insurer which leads an insured honestly to believe that by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, estops the insurer from insisting upon a forfeiture, though it might be claimed under the express letter of the contract, and a statement by a general agent of a corporation, in the course of his employment, as to a fact within his official knowledge touching the status of a matter intrusted to him, is admissible in evidence on behalf of the party with whom the corporation was dealing at the time.<sup>116</sup> Again, in a New York case,<sup>117</sup> the provision in the policy prohibited waiver of the conditions in the printed policy, which was in the New York standard form, but the agent was permitted to waive, in writing, indorsed upon or attached to the policy, conditions added to the authorized form. The agent had possession of the policy, and the insured pleaded ignorance of its conditions in the above respect, but the court held that he was bound thereby. So where a waiver is required to be in writing, signed by the president and secretary, the company may defend on the ground that the suit on the policy was not commenced within the limited time, notwithstanding the fact that the insured had been induced to delay suit by the representations of the company's general

<sup>115</sup> *Metropolitan L. Ins. Co. v. McGrath*, 52 N. J. L. 358; 19 Atl. 386.

<sup>116</sup> *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158; 39 Am. St. Rep. 637 (case of additional assurance obtained without written consent and notification to special agent, who notified insurer, who directed policy canceled, but it was not done until after loss. The general agent of the insurer, however, visited assured after fire, and endeavored to adjust the loss for a less sum than the amount insured, and saying that the agent had been notified by the company to cancel, but had failed so to do, and the assured not having received notice, and the company having knowledge, assured had a right to assume that the insurer had acquiesced in the obtaining further insurance).

<sup>117</sup> *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356; 45 St. R. 200; 31 N. E. Rep. 31.

agent, that it was unnecessary to sue, and that the company would make assessments and pay without suit.<sup>118</sup>

**§ 436. That Restrictions in Policy on Agent's Powers Only Relate to Acts After Policy Delivered.**—There is a class of cases which incline to a more liberal construction of an agent's powers in favor of the assured, than those considered in the two preceding sections. The substance of these decisions is that restrictions upon an agent's authority, set forth in the policy, are not conclusive upon the assured as to matters connected with the contract prior to its completion, but only relate to the exercise of his authority in matters concerning the policy after its delivery and acceptance. The ground of such rulings is that no presumption can reasonably attach, that the assured was cognizant of or could anticipate that such provisions would be made.<sup>119</sup> Such decisions are an important advancement in the direction of what seems, by the weight of authority to be the true rule, and which will be stated hereafter. Thus the court in a Minnesota case,<sup>120</sup> declares that "it would be a stretch of legal principle to hold that a person deal-

<sup>118</sup> *Waynesboro Mut. F. Ins. Co. v. Conover*, 98 Pa. St. 384; 42 Am. Rep. 618.

<sup>119</sup> *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; *Tubbs v. Dwelling House Ins. Co.*, 84 Mich. 646, 651-53; *Crouse v. Hartford F. Ins. Co.*, 79 Mich. 249; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 247; 23 Pac. Rep. 869. See *Hoose v. Prescott House Ins. Co.*, 84 Mich. 309; 47 N. W. Rep. 587; *Klister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553; *Gristock v. Royal Ins. Co.*, 84 Mich. 161; 47 N. W. Rep. 549; *Partridge v. Commercial Ins. Co.*, 17 Hun (N. Y.), 95; *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514; 70 Mich. 190; 32 Am. St. Rep. 519; *North British etc. Ins. Co. v. Crutchfield*, 108 Ind. 518. "In regard to waivers before issue, it is by no means clear that the constructive notice supplied by provisions of a policy not yet in the hands of the applicant should be held binding upon him. . . . Only where the custom of limiting the authority of a general agent in the policy has become so general that it is part of the ordinary business knowledge of the world that such provisions exist, and are to be examined, will it be proper to hold the applicant bound by them, in respect to negotiations prior to the policy": 1 *May on Insurance*, Parson's ed., sec. 138, p. 245.

<sup>120</sup> *Kausal v. Minnesota Farmers' Mut. F. Ins. Assn.*, 31 Minn. 17; 47 Am. Rep. 776, per Mitchell, J.

ing with an agent apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice given, after the negotiations were completed, that the party with whom he had dealt should be transformed from the agent of one party into the agent of the other. To be efficacious such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that, by a stipulation unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens on the insured which he never anticipated," and a clause in a policy withholding from agents authority "to make, alter, or discharge this or any other contract in relation to the matter of this insurance," is not a limitation of the powers of the agent in preparing and accepting the application. The provision takes effect only after the policy is effected and issued.<sup>121</sup> So it is held in Illinois,<sup>122</sup> that acts and omissions of an agent of the insurer, which took place before the delivery of the policy, cannot be set up in avoidance thereof. And in Pennsylvania,<sup>123</sup> it is likewise declared that the company cannot evade its liability on a policy, because of the fraud or mistake of its agent, by setting up a stipulation in the policy that the agent shall be deemed the agent of the insured, where the latter was ignorant of an intent to insert such a condition. So where the policy was issued on oral application, it was held that a condition in the policy, that the company would not be bound by any act or statement made to or by an agent, unless the same were contained in the policy or application, did not bind the assured except as to statements and

<sup>121</sup> *Mutual B. L. Ins. Co. v. Robinson*, 19 U. S. App. 274, per Caldwell, J.; 58 Fed. Rep. 723; 7 U. S. C. C. A. 444.

<sup>122</sup> *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Reaper City Ins. Co. v. Jones*, 62 Ill. 458.

<sup>123</sup> *Ellenberger v. Protective Mut. F. Ins. Co.*, 89 Pa. St. 404.

acts of the agent made and done after the delivery and acceptance of the policy.<sup>124</sup>

**§ 437. That Restrictions in Policy on Agent's Powers Only Relate to Acts Before Loss.**—There is still another class of decisions which hold that restrictions in the policy upon an agent's powers do not relate to conditions to be performed after loss has occurred.<sup>125</sup> Therefore it is held that a condition in an accident policy prohibiting waiver of any conditions in the policy by an agent of the company, except authority to waive, should be conferred on the agent by a writing signed by the president and secretary, do not relate to conditions to be performed subsequently to the loss.<sup>126</sup> A stipulation requiring waiver by an agent to be indorsed upon a policy in writing, does not apply to these conditions to be performed subsequently to the loss, and an adjuster has power to waive the condition as to arbitration, and make a different agreement concerning the same,<sup>127</sup> so an agent may waive proofs of loss by parol notwithstanding such inhibition.<sup>128</sup> Substantially the same ruling has been made in Missouri,<sup>129</sup> in Iowa,<sup>130</sup> in Kansas,<sup>131</sup> in Maryland,<sup>132</sup> in Mississippi.<sup>133</sup> So in California<sup>134</sup> it is

<sup>124</sup> *Hoose v. Prescott Ins. Co.*, 84 Mich. 309; 11 L. R. Annot. 340; 32 Cent. L. J. 226; 47 N. W. Rep. 587.

<sup>125</sup> *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; *Loeb v. American Cent. Ins. Co.*, 99 Mo. 50; 12 S. W. Rep. 374; *Dibbrell v. Georgia Home Ins. Co.*, 110 N. C. 193; 14 S. E. Rep. 783; *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179, 184; *Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; 11 Am. Rep. 469. See *Priest v. Citizens' Ins. Co.*, 3 Allen (85 Mass.), 602; *Forward v. Continental Ins. Co.*, 142 N. Y. 382.

<sup>126</sup> *Travelers' Ins. Co. v. Harvey*, 82 Va. 949; 5 S. E. Rep. 553.

<sup>127</sup> *Harrison v. German-American F. Ins. Co.* (U. S. O. C. S. D., Iowa, 1895), 67 Fed. Rep. 577.

<sup>128</sup> *Carson v. Jersey City F. Ins. Co.*, 43 N. J. L. 300; 39 Am. Rep. 584.

<sup>129</sup> *Loeb v. American Ins. Co.*, 99 Mo. 50; 12 S. W. Rep. 374.

<sup>130</sup> *Stevens v. Citizens' Ins. Co.*, 69 Iowa, 658.

<sup>131</sup> *Insurance Co. v. Munger*, 49 Kan. 178.

<sup>132</sup> *Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; 11 Am. Rep. 469; *Rokes v. Insurance Co.*, 51 Md. 512.

<sup>133</sup> *New Orleans Ins. Assn. v. Matthews*, 65 Miss. 301.

<sup>134</sup> *Wheaton v. North British & Mercantile Ins. Co.*, 76 Cal. 415; 18 Pac. Rep. 758.

held that instructions that an agent might, by keeping proofs of loss without objection, waive delay in service thereof, did not constitute reversible error, although the policy provided that the use of general terms should not be construed as a waiver, and that the agent had no power to waive conditions.

**§ 438. That Restrictions in Policy on Agent's Powers are Only Prima Facie Binding.**—Mr. Ostrander seems to be of the opinion that, where the policy has come into the hands of the assured, he is bound by limitations thereon upon an agent's powers.<sup>135</sup> Mr. Wood<sup>136</sup> states the rule thus: "But where a limitation is imposed upon the power of the agent upon the face of the policy of which the assured, as a prudent man, ought to know, and there is no evidence that the agent has been accustomed to act in excess of such power, with the express or implied assent of the insurer, the insured is not justified in dealing with him in reference to such matters, and his acts, as to the excess of the authority, are not binding upon the company."<sup>137</sup> Mr. Parsons,<sup>138</sup> referring to decisions where it is held that, in case of restrictions in the policy upon an agent's power, he cannot bind the company by acts in excess of such limitation says: "It seems very doubtful if the doctrine of these cases is entirely correct. The assured has a

<sup>135</sup> Ostrander on Fire Insurance, 94, 134, et seq.; citing *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; 9 Hun (N. Y.), 421; *Kroeger v. Birmingham Ins. Co.*, 2 Norris (Pa.), 264; *Hankins v. Rockford Ins. Co.*, 70 Wis. 1; 35 N. W. Rep. 34; *Zimmerman v. Home Ins. Co.*, 77 Iowa, 685; 42 N. W. Rep. 462; *Wilkins v. States Ins. Co. etc.*, 43 Minn. 177; 45 N. W. Rep. 1; *Smith v. Niagara Fire Ins. Co.*, 60 Vt. 682; 15 Atl. Rep. 353; *Gladding v. Insurance Assn.*, 66 Cal. 6; 13 Ins. L. J. 893; *Mersereau v. Insurance Co.*, 66 N. Y. 274; *Marvin v. Insurance Co.*, 85 N. Y. 278; 39 Am. Rep. 657; *O'Reilly v. Corporation of Life Ins.*, 101 N. Y. 575; 5 N. E. Rep. 568; *Kyte v. Assur. Co.*, 144 Mass. 43; 10 N. E. Rep. 518; *McIntyre v. Insurance Co.*, 52 Mich. 188; 17 N. W. Rep. 781; *Cleaver v. Insurance Co.*, 65 Mich. 527; 32 N. W. Rep. 660; *Bowlin v. Insurance Co.*, 36 Minn. 433; 31 N. W. Rep. 859; *Shuggart v. Insurance Co.*, 55 Cal. 468, and other cases.

<sup>136</sup> 2 Wood on Fire Insurance, 2d ed., p. 863, sec. 417.

<sup>137</sup> But see *Id.*, p. 886.

<sup>138</sup> In 1 May on Insurance, Parsons' ed., sec. 137 a. p. 244.



right to suppose that a general agent has all the powers incident to his business, unless he has knowledge to the contrary, and usage may overcome the provisions of a policy. . . . Prudent men are accustomed to rely upon the acts and statements of the agents, and they should be protected in so doing. . . . As to waivers taking place after issue, it is very proper to require the assured to look at his policy and conform to it, and limitations of the agent's authority should be effective unless, by a course of business or otherwise, the company has waived the limitation on the agent's power of waiver." It is held in a New York case that under a policy which provides that the insurer shall not be bound by any act or statement made by any agent "which is not authorized by the policy or contained therein, or in any written paper mentioned therein," the agent's powers can only be exercised in the prescribed mode, unless it be shown that the agent possessed the power of the principal to waive the provision in question. In this case the policy was conditioned to be void if the building insured should become vacant or unoccupied, unless consent therefor should be indorsed in writing on the policy. The building became unoccupied within the meaning of the policy. No written consent therefor was indorsed thereon. The question arose whether the condition mentioned had been waived by the agent. It appeared that the insured told the company's agent that the tenant had vacated the premises, and he said, "All right." That when the agent delivered the policy he asked the insured to notify him if the tenants should move out. The agent also told the insured that he would fix her policy. The only evidence of the agent's authority were the facts that he delivered the policy, that it was countersigned by him, and that when the policy was issued he had indorsed thereon without extra charge, a consent that the building might be finished, all of which acts were done by him over his signature as "defendant's agent." The court held that the evidence was "quite insufficient to justify this court in holding, as a matter of law," that the agent "possessed the powers of the principal in respect to the provisions under consideration, or any powers

except such as he was shown to have exercised," and that the burden of proof was upon the assured to show that the agent possessed the authority to waive the condition as to occupancy of the building. This case only decides that the agent's authority was not sufficiently broad to warrant an exercise of the authority claimed, and it is conceded that had the authority been proven, the inhibition against waiver by the agent could have been waived.<sup>139</sup> But it is said in an earlier New York case,<sup>140</sup> that if the policy contains a distinct, written limitation of an agent's power, the evidence must clearly show that the agent, exceeding such restrictions in the policy, acted either by direct authority of the company, or that it knowingly permitted such acts. In a Massachusetts case,<sup>141</sup> it is held that a local agent, with authority to issue policies and receive premiums, has no authority as such agent to waive the terms and conditions of the policy, or to waive conditions requiring the printed or written consent of the company to a change in the situation or circumstances affecting the risk, and the court qualifies the force of this ruling, by saying, substantially, that additional evidence must be given, showing that as the agent was held out by the company to have a broader authority, or that the company had ratified similar acts, or by its acts in like dealings has warranted a justifiable belief on the part of the assured that the agent had the claimed authority. But the court adds that the fullest authority would not warrant a waiver by the agent except in the manner specified in the policy, and such a rule is reasonable as guarding against the uncertainties of oral evidence. So in an Illinois case it is declared that an assurer cannot defend on the ground of excess of authority unless the assured knew, or ought to have known, the precise limits of the agent's authority,<sup>142</sup> and

<sup>139</sup> *Messelbach v. Norman*, 122 N. Y. 578; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278; 39 Am. Rep. 657.

<sup>140</sup> *Mersereau v. Phoenix*, 66 N. Y. 279, per Allen, J.

<sup>141</sup> *Kyte v. Commercial Assur. Co.*, 144 Mass. 46.

<sup>142</sup> *Ætna Ins. Co. v. Maguire*, 51 Ill. 342, per Breese, C. J.

that the company must show that the assured had such notice; <sup>143</sup> and in another case in that state <sup>144</sup> it is held that although the policy restricts the agent's authority, such inhibition is not conclusive upon the company, and if the agent is held out by the company to possess the requisite power, and third persons deal with him in view of such apparent authority, the company is bound.

**§ 439. Conclusion—Agent may Waive Conditions Notwithstanding Inhibition in Policy.**—It is difficult to state what constitutes weight of authority. Experience teaches that those courts which are inclined to adhere strictly to the rule *stare decisis* are little disposed to go outside of the decisions of their own states which are in point, especially if such decisions are based upon comparatively sound reasons. Certainly many of the cases which uphold the doctrine that restrictions in the policy upon an agent's authority conclude the assured are not mere arbitrary rulings, but are as well considered and will bear as close and careful study as those of the opposing view, and many of them, under the peculiar circumstances of the case, cannot be controverted. While we believe that the rule hereinafter stated is more in consonance with justice and reason, we are nevertheless aware of the reluctance of many courts to overthrow former decisions; so again the proof before the court, in any given case, may warrant a departure from stated rules. We deduce, however, the rule, that the tendency of the weight of authority at the present day is against making restrictions in the policy upon an agent's authority conclusive upon the assured and that the company, or any agent with general or unlimited powers, clothed with an actual or apparent authorization, may either orally, or in writing, waive any written or printed condition in the policy, notwithstanding such restrictions, and many cases apply this rule, even though the policy provides that a distinct specific agree-

<sup>143</sup> *Hartford Ins. Co. v. Farrish*, 73 Ill. 166.

<sup>144</sup> *Eclectic L. Ins. Co. v. Fahrenkrug*, 63 Ill. 463.

ment shall be indorsed thereon, or otherwise prescribes a particular mode of waiver or that only certain persons can waive, and there would be no valid reason why if the agent may waive the restriction in the first case he may not in the latter,<sup>145</sup> for such restrictions are declared to be ineffectual to limit the legal capacity of the company to bind itself by waiving conditions of the policy through an agent acting within the real or apparent scope of his authority.<sup>146</sup> So it is held that although the policy may stipulate that a waiver can only be established by a written agreement, indorsed on the policy, yet a waiver by acts in pais may be shown by parol testimony.<sup>147</sup> Some of the cases, however, rest their conclusions, not upon the ground of a technical waiver, but upon the principle of estoppel by the

<sup>145</sup> *Weed v. Lancashire F. Ins. Co.*, 116 N. Y. 117, per Blinn, J.; *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352; 50 N. W. Rep. 24; 21 Ins. L. J. 72; *Whited v. Germania Ins. Co.*, 20 N. Y. Sup. Ct. 191; 76 N. Y. 415; *Home Ins. Co. v. Stone River Nat Bank*, 88 Tenn. 369; 12 S. W. Rep. 915; *Jennings v. Metropolitan L. Ins. Co.*, 148 Mass. 61; 18 N. E. Rep. 601; *Wheaton v. North British & Mercantile Ins. Co.*, 76 Cal. 415; 18 Pac. Rep. 758; *Minnock v. Fire & M. Ins. Co.*, 90 Mich. 236. But see *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302; *Red-strike v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 294; *Appleton v. Phoenix Ins. Co.*, 59 N. H. 541; 47 Am. Rep. 220; *Pechner v. Phoenix Ins. Co.*, 6 Lans. (N. Y.) 411; 65 N. Y. 195; *Smith v. Niagara F. Ins. Co.*, 60 Vt. 682; 15 Atl. Rep. 353; *Smith v. Commercial Union Assur. Co.*, 33 U. C. Q. B. 69; *Morrison v. Insurance Co. of North America*, 69 Tex. 353; 6 S. Rep. 605; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 247; 23 Pac. Rep. 869; *Collins v. Insurance Co.*, 79 N. C. 280; *Marcus v. St. Louis Mut. L. Ins. Co.*, 68 N. Y. 625; *Wyman v. Phoenix Mut. Ins. Co.*, 119 N. Y. 274; *Grubbs v. N. C. Home Ins. Co.*, 108 N. C. 472; 23 Am. St. Rep. 62; *Maryland F. Ins. Co. v. Grisdorf*, 43 Md. 506; *Young v. Hartford F. Ins. Co.*, 45 Iowa, 377; 24 Am. Rep. 784; *Willcuts v. N. W. L. Ins. Co.*, 81 Ind. 300; *McFarland v. Kittanning Ins. Co.*, 134 Pa. St. 590; 19 Am. St. Rep. 723; *Tiltsworth v. American Cent. Ins. Co.* (Kan. City Ct. App. 1895), 1 Mo. App. Rep. 519; *Queens Ins. Co. v. Young*, 86 Ala. 424; 11 Am. St. Rep. 51; *Oshkosh Gas-Light Co. v. Germania Ins. Co.*, 71 Wis. 454; 5 Am. St. Rep. 233; *Berry v. American Central Ins. Co.*, 132 N. Y. 49; 43 St. R. 400; 30 N. E. Rep. 254; 21 Ins. L. J. 455; 45 Alb. L. J. 402.

<sup>146</sup> *Lamberton v. Connecticut F. Ins. Co.*, 39 Minn. 129; 39 N. W. Rep. 76.

<sup>147</sup> *Mix v. Royal Ins. Co. of Liverpool*, 169 Pa. St. 639; 32 Atl. Rep. 460; *McFarland v. Insurance Co.*, 134 Pa. St. 590; *Gould v. Insurance Co.*, 184 Pa. St. 570.

acts and representations of the company's authorized representative, and in a Michigan case waiver is declared by the court to be another term for an estoppel and that "it can never arise by implication alone, except from some conduct which induces action in reliance upon it."<sup>148</sup> The insurer may be estopped by the acts and conduct of its agent to defend upon the ground of breach of conditions, notwithstanding stipulations that no agent may waive any condition.<sup>149</sup> But it must be shown that the agent had an actual or apparent authority to waive the provision in question, or some ratification of the act.<sup>150</sup> Such authority of the agent to waive is declared to exist where he has general or unlimited powers or an actual or ostensible authorization, or it may be warranted by a course of business, or it may rest upon the doctrine of estoppel. So an agent may waive a formality provided for in the policy, as that consent to an assignment be indorsed thereon. If the company can do this, their agent possesses, as to all persons innocently dealing with him, full power to do so. Such a principle of law is said to be as essential to the true interests of the company and profitable management of its business, as it is for the protection of the public. It cannot reasonably be presumed that a principle of law would benefit the company, which required that for every departure from the company's rules, however unessential it might be, resort must be had to the principal office or to the directors.<sup>151</sup> The words of Mr. Justice Bradley in *Knickerbocker Life Insurance Company v. Norton*<sup>152</sup> are important in this connection. He says the policy "contained an

<sup>148</sup> *Security Ins. Co. v. Fay*, 22 Mich. 467; 7 Am. Rep. 670, per Campbell, C. J.

<sup>149</sup> *Dwelling-House Ins. Co. v. Dowdall*, 55 Ill. App. 622 (case of delay in furnishing proofs of loss relied upon as induced by acts and conduct of agent).

<sup>150</sup> *Porter v. United States L. Ins. Co.*, 160 Mass. 183; *Messelbach v. Norman*, 122 N. Y. 578; *Kyte v. Commercial Assur. Co.*, 144 Mass. 46; *Security Ins. Co. v. Fay*, 22 Mich. 467; 7 Am. Rep. 670.

<sup>151</sup> *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; 9 Am. Rep. 235, per Foster, J., and cases cited.

<sup>152</sup> 96 U. S. 234. Three judges dissented on the ground that the waiver could not be made by the agent after a forfeiture had occurred.

express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on. But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures, but might at any time at its option give them such power. The declaration was only tantamount to a notice to the assured which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture, and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement because it would only be an exercise of an option which the agreement left it." In this case the question was whether in view of the express provisions of the policy that the agents of the company were not authorized to make, alter, or abrogate contracts, or waive forfeitures, the evidence introduced by the assured was relevant and competent to show that the company had authorized its agent to grant indulgence as to the time of paying premium notes and waive a forfeiture arising from nonpayment or to show that any valid extension had in fact been granted or the forfeiture waived, and evidence was held admissible for the purpose of proving the agent's authority that it was the practice of the company's agent to take notes instead of money for the premiums, and to extend the time for payment of premiums, and of the company to receive such notes, notwithstanding the inhibition in the policy. A provision that no agent can change any of the terms of the policy by parol does not apply to a construction by him on request of doubtful language therein.<sup>153</sup> And the receipt by the company, through its general agent, of renewal premiums taken by him with knowledge of other insurance, operates as a waiver of a condition requiring a formal notice and indorsement there-

<sup>153</sup> *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269; 44 N. W. Rep. 1106.

of on the policy, although the policy provides that conditions can only be waived by a writing signed by the secretary, and it was also held in this case that the waiver might be by parol.<sup>154</sup> And an authority to waive a forfeiture may be expressly or impliedly vested in an agent, although the policy provides that no agent, other than the president and secretary, can waive.<sup>155</sup> And if the act is within the scope of the agent's general authority, he may bind the company by acts done contrary to the inhibition of the policy.<sup>156</sup> So in Indiana,<sup>157</sup> an agent with authority to examine and adjust a loss may orally waive preliminary proofs of loss notwithstanding a clause contra in the policy. So the rule has been upheld in Iowa.<sup>158</sup> It has been sustained in Maryland.<sup>159</sup> So it is held in Michigan<sup>160</sup> that an agent authorized to countersign the policy might consent to other insurance, but that the consent of a local agent, neither authorized nor held out as being authorized, would not bind the company. Substantially the same decisions have been given in New York.<sup>161</sup> Thus in another case in New York it was declared that the power of a general agent to waive conditions of the policy is coextensive with that of the company itself, where such agent has authority to make contracts without reference to the home office.<sup>162</sup> In a later case, however,

<sup>154</sup> *Carroll v. Charter Oak Ins. Co.*, 10 Abb. Pr., N. S. (N. Y.), 106; 40 Barb. (N. Y.) 292. See *Kolgers v. Guardian etc. Ins. Co.*, 10 Abb. Pr., N. S. (N. Y.), 176; 58 Barb. (N. Y.) 186.

<sup>155</sup> *Union Mut. L. Ins. Co. v. McMullen*, 24 Ohio St. 67.

<sup>156</sup> *Lamberton v. Connecticut F. Ins. Co.*, 39 Minn. 129; 39 N. W. Rep. 76; 1 L. R. Annot. 222.

<sup>157</sup> *Indiana Ins. Co. v. Capehart*, 108 Ind. 270.

<sup>158</sup> *Young v. Hartford Ins. Co.*, 45 Iowa, 377; 24 Am. Rep. 784 (waiver was by parol). See, also, *Mattocks v. Des Moines Ins. Co.*, 74 Iowa, 233; 37 N. W. Rep. 174; *Frane v. Burlington Ins. Co.*, 87 Iowa, 283; 22 Ins. L. J. 364; 54 N. W. Rep. 237; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83.

<sup>159</sup> *Maryland F. Ins. Co. v. Gusdorf*, 43 Md. 506; *Franklin Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; 11 Am. Rep. 469.

<sup>160</sup> *Security Ins. Co. v. Fay*, 22 Mich. 467; 7 Am. Rep. 670.

<sup>161</sup> *Wyman v. Phoenix Mut. Ins. Co.*, 119 N. Y. 274 (case of waiver of forfeiture for nonpayment of premiums).

<sup>162</sup> *Berry v. American Central Ins. Co.*, 132 N. Y. 49; 43 St. R. 400;

where the contract stipulated that it should be void if other insurance should be obtained without the company's consent on the policy in writing, and that no agent had power to waive said provision, it was held that consent in writing as stipulated was necessary to constitute a waiver of said condition, and the agent had no power to give such consent, and that the agent's knowledge of additional insurance did not bind assurers, although he had promised assured, upon information given thereof, that "he would attend to it."<sup>163</sup> So as a general rule, if the insurer, through the conduct of any agent, acting within the scope of his authority, leads the insured into an infraction of one of the conditions of a policy, by insisting upon the performance of a duty enjoined by another clause of the policy, and inconsistent with the observance of such condition, the insurer will be estopped from insisting upon a forfeiture. Such is the rule declared by the court, per Avery, J., in a North Carolina case, where it is held that a time limitation in the policy for suing may be waived by the conduct of the agent, in demanding compliance with a stipulation in the policy, the enforcement of which would be inconsistent with another provision in the policy requiring a written indorsement of waiver.<sup>164</sup> And a provision that the use of general terms shall not be construed as a waiver of any condition in the policy may

21 Ins. L. J. 455; 45 Alb. L. J. 402; 30 N. E. Rep. 254. See *Reed v. Equitable F. & M. Ins. Co.*, 17 R. I. 785; 24 Atl. Rep. 833.

<sup>163</sup> *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547; 50 St. R. 19; 32 N. E. Rep. 990; reversing 15 N. Y. Supp. 573; and 61 Hun (N. Y.), 118; citing *Allen v. German-American Ins. Co.*, 123 N. Y. 6; *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y. 356; *Messelbach v. Norman*, 122 N. Y. 583; *Walsh v. Hartford Ins. Co.*, 73 N. Y. 5.

<sup>164</sup> *Dibbrell v. Georgia Home Ins. Co.*, 110 N. C. 193, 206; 14 S. E. Rep. 783; citing 2 May on Insurance, p. 1144, and notes 2, 3, secs. 497, 499, 504; *Id. v. Insurance Co.*, 2 Burr. 235. The court also says in this case: "In *Muse v. Assurance Co.*, 108 N. C. 242, it is declared that such stipulations operating as forfeitures are construed strictly, and comparatively slight evidences of waiver have been held sufficient to prevent their enforcement: *Ripey v. Insurance Co.*, 29 Barb. (N. Y.) 552; *Ames v. Insurance Co.*, 14 N. Y. 253"; *Id.* 206. See, also, *Carey v. Fire Ins. Co.*, 171 Pa. St. 204; citing and relying upon *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460.



be waived by the company through its agent, and is not a limitation as to the manner of exercise of the agent's powers.<sup>165</sup> It has been declared in Texas,<sup>166</sup> that such limitations in the policy are not conclusive, and that the corporation will be bound if the act is within the scope of the agent's authority. And in another case in the same state it was held that an agent might orally waive conditions as to other insurance, although the policy provided that no agent had authority to bind the company, in violation of the printed terms of the contract, and that any waiver of any of the restrictions or stipulations of the policy must be by distinct agreement contained in the body of the policy.<sup>167</sup> So in Vermont,<sup>168</sup> the statements of the general agent to the assured, that benzine was covered by the policy, is competent evidence of knowledge of the company that it was kept, notwithstanding that the agent could not waive conditions without written authority. The rule has been upheld in Wisconsin,<sup>169</sup> and it is also declared in that state that an attempted restriction of the power of the general officers or agents of the company, acting within the scope of their general authority, is ineffectual, especially in case of a foreign company.<sup>170</sup> So the United States supreme court has decided that acts of the agent, in excess of limitations upon his powers in the policy, may be warranted by a course of business.<sup>171</sup> And in

<sup>165</sup> *Goldwater v. Liverpool, London & Globe Ins. Co.*, 39 Hun (N. Y.), 176; this case is distinguished in *Hess v. Washington F. & M. Ins. Co.*, 33 St. R. 730; 11 N. Y. Supp. 299; affirmed without opinion, 125 N. Y. 764; 12 Cent. Rep. 49. See *Richmond v. Niagara F. Ins. Co.*, 79 N. Y. 230; *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 273; *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 323.

<sup>166</sup> *Niagara Ins. Co. v. Lee*, 73 Tex. 641; 11 S. W. Rep. 1024.

<sup>167</sup> *Morrison v. Insurance Co.*, 60 Tex. 353; 6 S. W. Rep. 605.

<sup>168</sup> *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418; 38 Am. Rep. 637, 600.

<sup>169</sup> *Roberts v. Continental Ins. Co.*, 41 Wis. 321; cited in *Schooner v. Hekla F. Ins. Co.*, 50 Wis. 575, 579; in *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361, 369; and in *Alexander v. Continental Ins. Co.*, 67 Wis. 423, 427.

<sup>170</sup> *Reiner v. Dwelling-House Ins. Co.*, 74 Wis. 89; 42 N. W. Rep. 208 (case of proofs of loss; decision under Rev. Stat. Wis., sec. 1977, relating to agents).

<sup>171</sup> *Insurance Co. v. Norton*, 96 U. S. 234 (case of extension of time

another case in the same court, it appeared that the company was accustomed to furnish its local agent with renewal receipts, to be used in their discretion, and that they were accustomed to deliver them, after the time stipulated for payment of premiums, which practice the company had sanctioned, and it was held that the agent, by giving a renewal receipt with knowledge that the premium was overdue, waived the forfeiture, notwithstanding the policy prohibited the agent from waiving forfeitures.<sup>172</sup> It is true that in the first of the cases in the United States court, some consideration was given to the principle that forfeitures are not favored in law, but the decision rested mainly upon the power of the agent arising from a constant practice to waive the forfeiture, notwithstanding the language of the policy. Another reason which is given as upholding the rule established by the cases is that courts are not disposed to favor stipulations or agreements which in effect tend to overthrow established rules of evidence.<sup>173</sup> An agent may bind the company by merely signing a paper permitting additional insurance, even though the policy requires that consent thereto be indorsed on the policy,<sup>174</sup> and such requirement of consent in writing to other insurance may be waived by the agent's acts.<sup>175</sup> There is also sufficient evidence of waiver to go to the jury in such case, where the agent attaches to the policy a printed form used therefor and signs the same, especially where the policy does not state where or by whom the company's consent should be indorsed on the policy.<sup>176</sup> So the use of kerosene does not avoid the policy, notwithstanding the

for payment of premiums). See, also, *Harnden v. Milwaukee Mechanics' Ins. Co.*, 164 Mass. 382.

<sup>172</sup> *Insurance Co. v. Wolff*, 95 U. S. (5 Otto) 328.

<sup>173</sup> *Travelers' Ins. Co. v. McConkey*, 127 U. S. 607. As to the authority of an agent to exceed limitations upon the authority given him by a written instrument, see 1 *Parsons on Contracts*, 61.

<sup>174</sup> *Mattocks v. Des Moines Ins. Co.*, 74 Iowa, 233; 37 N. W. Rep. 174.

<sup>175</sup> *Hayward v. National Ins. Co.*, 52 Mo. 181; 14 Am. Rep. 400. See, also, *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369; 12 S. W. Rep. 915; *Bonneville v. Western Assur. Co.*, 68 Wis. 298; 32 N. W. Rep. 34.

<sup>176</sup> *Grubbs v. Virginia F. Ins. Co.*, 110 N. C. 108; 14 S. E. Rep. 510.

policy provides for written consent to its use, where the agent was fully informed of such use.<sup>177</sup> And a condition requiring indorsement on the policy by the association, of consent to an assignment, is complied with by the written attestation thereof indorsed on the policy by the agent.<sup>178</sup> So a condition that the policy shall become void in case the premises become vacant without notice to the company, and its consent given in writing, is waived where the agent knows that the premises are unoccupied, and insures the same, but fails to strike out such condition, or give the company's written consent.<sup>179</sup>

So an agent's knowledge directly obtained that the building insured stands on leased grounds binds the company in the absence of collusion, though the policy requires that such fact be written in or indorsed upon the policy, and also provides that nothing less than a distinct specific agreement indorsed on the policy shall be a waiver.<sup>180</sup> Mr. Richards, referring to stipulations of the kind here considered, says such clauses in a printed form do not very closely resemble an agreement between two parties, deliberately and intelligently made, and that an agent, with authority sufficiently broad, can waive a clause denying his authority as well as any other clause, that "a stipulation of this character, it may be contended, is, (1) a recital of fact, or (2) an agreement to be complied with, or (3) a mutual promise between the insured and the insurers that the policy shall be the sole evidence of the alleged fact of nonagency," and he argues that it is not binding as a recital of fact; that if it is a stipulation both parties are bound and parol evidence is admissible to show a breach on the part of the company in permitting its agents to solicit insurance, superintend the execution of policies, etc.; that it is not conclusively binding after the inception of the contract, for the company might, in

<sup>177</sup> *Bennett v. North British etc. Ins. Co.*, 81 N. Y. 273; 37 Am. Rep. 501.

<sup>178</sup> *New Orleans Ins. Assn. v. Holburg*, 64 Miss. 51; 1 S. Rep. 5; 8 S. Rep. 175.

<sup>179</sup> *Devine v. Home Ins. Co.*, 32 Wis. 471. See, also, *Palmer v. St. Paul F. & M. Ins. Co.*, 44 Wis. 201.

<sup>180</sup> *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369; 12 S. W. Rep. 915.

spite of the contract and after its delivery, change the scope of its agent's authority, nor conclusively binding in respect to negotiations prior to the inception of the contract.<sup>181</sup>

§ 440. **Opinions of Courts upon Waiver and Estoppel—Agents.**—The evidence must establish the waiver claimed. Thus it is said by Follett, C. J., in a New York case “undoubtedly a party to the contract which contains a provision that it shall not be changed except by a writing signed by him, may by conduct estop himself from enforcing the provision against a party who has acted in reliance upon the conduct; and so the acts of an agent, who possesses the power of the principal, or who has been held out by the principal to possess his power, in respect to the provision alleged to have been altered or changed, may also estop his principal. But under a policy containing a provision that the insurer ‘shall not be bound . . . by any act or statement made . . . by any agent . . . which is not authorized by this policy, or contained therein, or in any written paper mentioned therein,’ the power can only be exercised in the mode prescribed, unless it is shown that the agent possessed actually or apparently the power of his principal in respect to the provision alleged to have been waived.”<sup>182</sup> In *Insurance Company v. Gibson*,<sup>183</sup> the condition was: “No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power, or be deemed to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto.” Whitfield, J., who delivered the opinion of the court, declares that “it is vain to say that this clause does not seek to prevent the corporation itself from waiving a stipulation. A corporation

<sup>181</sup> Richards on Insurance, ed. 1892, 89-94.

<sup>182</sup> *Messelbach v. Norman*, 122 N. Y. 578 (evidence of authority of agent in this case was not sufficient). See *Forward v. Continental Ins. Co.*, 142 N. Y. 382.

<sup>183</sup> 72 Miss. 63.

acts only through agents, and if 'no agent, no officer, and no other representative' can waive a stipulation, who is left to waive it for the corporation? This clause is a species of refinement by which the corporation withdraws its invisible and intangible ideality, when liability is sought to be imposed upon it, bound by the acts of no agent, officer, or other representative, but reaches forth with Briarean hands to receive the profits and avails of these same acts performed by these same 'agents,' as against those with whom these same agents have dealt. The refinement is too subtle for the practical affairs of life, and we repudiate it. The provision relied on here is in the exact words of the stipulation relied on in *Lamberton v. Insurance Company*<sup>184</sup> . . . . , respecting which the court says, in a very clear and strong opinion, 'that is to say, in other words, that one of the parties to a written contract which is not required by law to be in writing cannot, subsequent to the making of the contract, waive by parol agreement provisions which had been incorporated in the contract for his benefit. If this provision is effectual at all as a limitation of the power of future action, it limits the power of every agent, officer, and representative of the company, and hence practically that of the corporation,' and it was held that 'this provision not being a limitation upon the authority of any particular agent, or class of agents, but in effect upon the capacity of the corporation for future action,' could not be imposed, but was void." In a Pennsylvania case it is also declared that "it has been so many times decided that although a policy of insurance contains a stipulation that nothing less than a written agreement indorsed on the policy will suffice to establish a waiver, yet it is admissible to show by parol testimony a waiver by acts in pais, that it is scarcely necessary to refer to the authorities." <sup>185</sup> So in an Illinois case the court, per Wilkin, J., says: "The position of counsel that under the clause in the pol-

<sup>184</sup> 39 Minn. 129; 39 N. W. Rep. 76.

<sup>185</sup> *Mix v. Royal Ins. Co.*, 169 Pa. St. 639, 645, per Green, J.; citing *McFarland v. Insurance Co.*, 134 Pa. St. 590; *Gould v. Insurance Co.*, 134 Pa. St. 570; *State Ins. Co. v. Todd*, 83 Pa. St. 272, per Gordon, J. *Mix v. Royal Ins. Co.* was a case of waiver of proofs of loss by an agent.

icy which says that 'no officer, agent, or other representative of the company shall have power to waive any provision or condition of this policy,' the company could not be held to have waived the required sworn statement of loss by any acts or declarations of its agent Smith, is not maintainable. Such a statement was required for the sole benefit of the company, and it could certainly waive it or extend the time within which it should be furnished if it saw proper to do so, notwithstanding the statement in the policy that it would not; that is to say, even if the parties did agree by the policy that there should be no such waiver, they might subsequently change that agreement. Nor is it necessary in such case to prove a strict agreement to waive, but it may be inferred from the acts and conduct of the insurers inconsistent with an intention to insist upon the strict performance of the condition."<sup>186</sup> But in a Massachusetts case the court, per Field, C. J., says: "We think that the failure to perform a condition of a contract, the performance of which is essential to the continuance of the contract, cannot be waived by an agent when the contract itself declares that he shall not have power to waive it, or that only certain officers which do not include him shall have such power, unless after the contract was made authority has been given to the agent to waive the condition or the company has knowingly permitted him to waive such conditions."<sup>187</sup> In *Alexander v. Continental Insurance Company*<sup>188</sup> the court says: "The authority of an agent to waive the conditions of an insurance policy has been frequently asserted by this court, as well as other courts."<sup>189</sup> This rule is absolutely necessary for the protection of the insured. The insured deals with no one but the

<sup>186</sup> *Dwelling-House Ins. Co. v. Dowdall*, 159 Ill. 179, 184; citing *Parker v. Amazon Ins. Co.*, 51 Md. 512.

<sup>187</sup> *Porter v. United States L. Ins. Co.*, 160 Mass. 183, 186; citing *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 43; *Putnam Tool Co. v. Fitchburg Ins. Co.*, 145 Mass. 265; *Lycoming Ins. Co. v. Langley*, 62 Md. 196; *Marvin v. Universal Ins. Co.*, 85 N. Y. 278; *Enos v. Sun Ins. Co.*, 67 Cal. 621; *McIntyre v. Michigan State Ins. Co.*, 52 Mich. 188.

<sup>188</sup> 67 Wis. 422; 58 Am. Rep. 869, 872, per Taylor, J.

<sup>189</sup> Citing numerous cases.

agent; the company cannot deal with its patrons in any other way. Justice and law, therefore, require that the company shall be held to sanction what the agent agrees to and upon which the insured relies. To allow the company to enforce a condition or forfeiture of the policy for a neglect to do that which the agent informs the assured shall not avoid the policy, would work the greatest injustice." Again, in a Texas case,<sup>190</sup> the court, per Henry, J., says: "The limitation contained in the policy as to the powers of agents of the corporation and the manner of their exercise are not conclusive. The corporation cannot so limit or regulate its own powers to contract, and if it chooses to bind itself, through its agents, otherwise in any respect, it may unquestionably do so. If the act is within the scope of the authority of the agent at the time it is done, it will be binding upon the corporation, without reference to its conformity to restrictions contained in the policy." In a New York case, decided in 1894, the question was as to the construction of the standard policy, issued under the requirements of chapter 488 of the laws of 1886, and Bartlett, J., said: "The precise point involved in this case has been before this court frequently, since the enactment of the law of 1886. The use of the standard policy was compelled by legislative enactment to remedy existing evils, and, among others, to protect insurance companies from the perils of alleged parol waivers by their local agents. Every person who now enters into a contract of insurance is required to agree that no officer or agent or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms thereof may be subject of agreement indorsed thereon, and as to such provisions and conditions the waiver must be written upon or attached to the policy, and he specially covenants that he will not claim any privilege or permission unless it be in writing." The case was this: A policy was issued to the owner of mortgaged premises; no mortgagee clause was attached to the policy; simply the provision, "loss, if any, first payable to

<sup>190</sup> Niagara Ins. Co. v. Lee, 73 Tex. 646.

mortgagee, as interest may appear." An action was brought to foreclose the mortgage, judgment was obtained and the premises were advertised to be sold. Before the date fixed for sale the premises insured were destroyed by fire. Before the commencement of the foreclosure proceedings, plaintiffs to the action against insurers informed a duly authorized agent of the company that they were about to commence said proceedings, and the agent agreed that they might be commenced without injury to said plaintiffs' rights under the policy. It did not appear that the agent ever noted upon any register kept by him said fact of the commencement of foreclosure. The policy was signed by the president and secretary of the insurer, and by said agent. And it was said: "The judgment appealed from ignores the plain provisions of the contract of the parties relating to foreclosure and waiver, and is contrary to the decisions of this court on the precise point presented now and others which involve the same principles of construction. In *Quinlan v. Providence-Washington Insurance Company*<sup>191</sup> the necessity of notice in the case of foreclosure was considered. Judge Andrews, in discussing the question of alleged waiver, said:<sup>192</sup> 'It is to be assumed that Kelsey' (the agent of the company) 'learned of the commencement of the foreclosure proceedings, and thereupon assured the plaintiff that his rights under the policy would not be prejudiced thereby.' Again, . . . after holding that the principle that courts lean against forfeitures is unimpaired, the court says: 'But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power, nor is there any reason why courts should refuse to enforce forfeitures plainly incurred which have not been expressly or impliedly waived by the company.'"<sup>193</sup>

<sup>191</sup> *Anderson v. Manchester F. Assur. Co.* (Minn. 1895), 60 N. W.

<sup>192</sup> *Id.*, p. 363.

<sup>193</sup> *Moore v. Hanover F. Ins. Co.*, 141 N. Y. 219; reversing 71 Hun (N. Y.), 199; citing as "in harmony" with the above, *Armstrong v. Agriculture Ins. Co.*, 130 N. Y. 560; *Baumgarten v. Providence etc.*



Again, where a standard form of policy is required, an agent may not, by verbal assent to other insurance, waive a condition requiring such assent in writing indorsed on or annexed to the policy.<sup>194</sup>

§ 441. **Restrictions in Policy—Oral Waiver.**—An agent with sufficient authority to waive conditions in the policy may dispense with such conditions, orally as well as in writing. So a general agent has power to orally waive a condition, even though the policy provides that the use of general terms or anything less than a distinct, specific agreement, clearly expressed and indorsed on the policy shall not be construed as a waiver of any printed condition or restriction in the policy;<sup>195</sup> and where the policy required the company's indorsed consent in case the building insured became unoccupied, and the agent, upon being informed of the vacancy, said "all right," there was held to be a waiver of the condition.<sup>196</sup> So a general agent may, after a loss, bind the company by parol waiver of proofs of loss, notwithstanding the policy provides that a waiver shall be void unless in writing, signed by the agent and indorsed thereon.<sup>197</sup> And where the agent was informed of additional insurance, and said he would write to the company for it, which he did, and told the assured it was all right, but failed to indorse the required consent upon the policy, the company was held bound

*Ins. Co.*, 136 N. Y. 547; *Allen v. German-American Ins. Co.*, 123 N. Y. 6; *Messelback v. Norman*, 122 N. Y. 583; *O'Brien v. Prescott Ins. Co.*, 134 N. Y. 28; *Lett v. Guardian Ins. Co.*, 125 N. Y. 82. But see *Forward v. Continental Ins. Co.*, 142 N. Y. 382.

<sup>194</sup> *Anderson v. Manchester F. Assur. Co.* (Minn, 1895), 60 N. W. Rep. 1095; 20 *Ins. L. J.* 222; distinguishing *Lamberton v. Insurance Co.*, 39 Minn. 129; 39 N. W. Rep. 76. Rehearing granted upon point of constitutionality of statute cannot waive where standard policy: *Parker v. Rochester German Ins. Co.*, 162 Mass. 479; 39 N. E. Rep. 179.

<sup>195</sup> *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315; distinguishing *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; *Van Allen v. Farmers' Joint Stock Ins. Co.*, 64 N. Y. 469; *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278.

<sup>196</sup> *Palmer v. St. Paul F. & M. Ins. Co.*, 44 Wis. 201.

<sup>197</sup> *Phoenix Ins. Co. v. Munger*, 49 Kan. 178; 30 *Pac. Rep.* 120; 12 *Rail. & Corp. L. J.* 105; 21 *Ins. L. J.* 682.

by the agent's representations.<sup>198</sup> So it is held in Tennessee that a written provision that the stipulations and conditions of the policy shall not be waived except by a certain officer may itself be waived by parol.<sup>199</sup> So the agent may bind the company by a parol agreement extending the time of payment of the premium, although the policy requires the consent of the company to be indorsed thereon in writing.<sup>200</sup> So a general agent may, it is held, waive a condition by parol, even though the policy requires that a waiver can only be made by a writing signed by the secretary, especially where the element of ratification exists;<sup>201</sup> and a local agent may orally waive proofs of loss, notwithstanding such conditions as to indorsement thereof on the policy.<sup>202</sup> But in a Washington case, where the policy contained the usual provision against waiver by agents except by writing or indorsement upon the policy, and the policy was delivered to the assurer's agent for indorsement of consent to the removal, under a promise to make the requested indorsement, and while the policy was in the agent's hands, and before indorsement made, the goods were destroyed by fire, and the insurer was held estopped from setting up the neglect of its own agent in order to relieve itself of liability.<sup>203</sup> The court, per Stiles, J., did not consider the case one of technical waiver, but of estoppel, and said: "The only material question then is, whether the agent had power to make the required indorsement in writing. He assumed to have it, for he agreed to do it, and received the policy for that purpose, thus lulling the respondent into a feeling of security, and in all probability preventing him from procuring insurance elsewhere. And while there is no evidence on the subject disconnected from the policy itself, we think that, as a fact, he did have the authority. The

<sup>198</sup> *Minnock v. Eureka F. & M. Ins. Co.*, 90 Mich. 236, 242; 51 N. W. Rep. 367.

<sup>199</sup> *Dale v. Continental Ins. Co.*, 95 Tenn. 38.

<sup>200</sup> *Young v. Hartford F. Ins. Co.*, 45 Iowa, 377; 24 Am. Rep. 784.

<sup>201</sup> *Pechnar v. Phoenix Ins. Co.*, 65 N. Y. 195; 6 Lans. (N. Y.) 411.

<sup>202</sup> *Van Allen v. Farmers' Joint Stock Ins. Co.*, 64 N. Y. 469.

<sup>203</sup> *Henschel v. Oregon F. & M. Ins. Co.*, 4 Wash. 476; 30 Pac. Rep. 735; 31 Pac. Rep. 332, 765 (two judges dissenting, a rehearing was denied).

appellant was a foreign corporation, whose agent was at Tacoma. This policy was, and presumably all policies issued by him were, in printed form, with the signatures of the president and secretary stamped, and only requiring the written signature of the agent to make it complete. He was a local general agent, who, in the absence of some restriction in the policy brought home to the respondent, was as to him, the appellant itself. *Maryland Fire Insurance Company v. Gusdorf*<sup>204</sup> is a case on all fours with this one, in pleadings, conditions of policy, and facts, except where the facts tended to show a waiver only. The court, speaking of the position of the plaintiff after receiving the assurance of the company that he could remove his goods without the indorsement, and acting upon it, said: 'By so acting he did that which prejudiced his interest under the policy. He thereby gave the company the advantage of retaining the premium without further continuance of the risk, and also the advantage of setting up this defense against their liability after the loss had occurred. Would not the success of this defense operate as a fraud upon the assured? We think it clear the company ought to be, and are, estopped from making it. Whilst the law affords ample protection to these companies, as well as to individuals, against frauds, misrepresentations, and breaches of warranty, it will not, and ought not, to help them to perpetrate frauds upon those with whom they make contracts, in which good faith on both sides, as well in their continuance as origin, has always been regarded as a ruling consideration?' So in this case the appellant, having received the premium for a year's insurance, now, without any offer to return any portion of the unearned premium, sets up what we deem an unconscionable defense, when it claims that, after actually insuring the respondent less than thirty days, the neglect of its own agent to do what he ought to have done should relieve it of all liability."

§ 442. **Same Subject—Cases Contra.**—Notwithstanding the preceding cases, it is held in a case in the United States circuit court of appeals that, although an inspector of a steam-

<sup>204</sup> 43 Md. 506. The company in this case was held estopped by the acts and declarations of its president.

boiler inspection and insurance company acts as its agent in procuring an insurance on steam-boilers, nevertheless he has no authority to modify by oral agreement a policy issued by the company, where the company has no knowledge of said agreement and has never ratified the same.<sup>205</sup> The court, per Sanborn, C. J., said in this case: "It is true that a written contract may be modified by a subsequent oral agreement, and that a contract of insurance may be made by parol. But it is nevertheless true . . . that the customary method of modifying policies of insurance and of making contracts of insurance for long terms is by written agreements . . . , and that the method pursued by the defendant when this policy was issued was to issue a written policy upon a written application. The fact that this talk was twenty-six days before the explosion and that no steps had been taken by either party meanwhile to put any contract of modification or of insurance in writing, and no demand had been made by the plaintiff for any such evidence of its contract, strongly indicates that no such contract was ever made. In *Head v. Insurance Company*<sup>206</sup> Chief Justice Marshall, in delivering the opinion of the supreme court, said: 'A contract varying a policy is as much an instrument as the policy itself, and therefore can only be executed in the manner prescribed by law. The force of the policy might, indeed, have been terminated by actually canceling it; but a contract to cancel is as solemn an act as a contract to make it, and, to become the act of the company, must be executed according to the forms in which by law they are enabled to act.' . . . There is another reason why the judgment below should be affirmed, and that is that there is no sufficient evidence in this record that the inspector had authority from the defendant to modify the policy or make a supplemental contract of insurance in its behalf." And the case turned upon the facts that there was no sufficient evidence of a modification or of authority of the agent to modify. So in *Hill v. Commercial*

<sup>205</sup> *Laclede Fire Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 60 Fed. Rep. 351; 9 U. S. C. A. 1, Caldwell, Circuit Judge, dissenting.

<sup>206</sup> 2 Cranch (U. S.), 127, 168.

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Insurance Company<sup>207</sup> it is held that an agent having power to grant written and printed permits has no authority to bind the company by an oral agreement to grant such permit. So it is also held that a local agent, with authority to receive premiums and issue policies, cannot bind the company by an oral waiver of conditions where the policy requires the company's written or printed consent to a waiver. In this case the agent was chairman of the board of selectmen of a town, and in such capacity issued a license for the sale of intoxicating liquors to the assured, assuring him that it would not affect his insurance.<sup>208</sup> In another case it is decided that in the face of such restriction and provision as to the manner of waiver the adjuster cannot orally waive a condition as to the time within which proofs of loss shall be furnished.<sup>209</sup> So in New York it is held that the agent's statement that it would be all right if the house was vacant did not operate as a waiver where the policy required the company's indorsed consent on the policy, although in this case the evidence as to the agent's authority was very meager, and the case turned upon the insufficiency of the evidence upon this point.<sup>210</sup> It is also held, where the policy provides that the waiver must be made at the head office and signed by an officer of the company, that an oral extension of the time of payment of the premium given by the general agent at another place is void.<sup>211</sup>

**§ 443. Where Agent Promises to Make Proper Indorsement on Policy but Fails to do so.**—In a case in Utah on this point the court says: "Counsel for appellant contend that the plaintiff cannot recover because he had other insurance on the property, and failed to have the consent of the defendant company thereto indorsed on the policy in question, which failure was a violation of that clause in the policy which provides that 'the entire policy, unless otherwise provided by

<sup>207</sup> 164 Mass. 406.

<sup>208</sup> *Kyte v. Commercial Union Assur. Co.*, 149 Mass. 116; 10 N. E. Rep. 518.

<sup>209</sup> *Smith v. Niagara F. Ins. Co.*, 60 Vt. 682; 15 Atl. Rep. 353.

<sup>210</sup> *Messelback v. Norman*, 122 N. Y. 578; 26 N. E. Rep. 34.

<sup>211</sup> *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278; 39 Am. Rep. 657.

agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make and procure any other contract of insurance, whether valid or not, on property covered, in whole or in part, by this policy.' If this clause be literally construed, and the agent cannot waive a compliance therewith by his acts or neglect, and bind the principal as is insisted, then indeed the insured is without a remedy. The agent was authorized to issue policies to parties seeking insurance to fix rates and premiums, and to countersign, renew, and sign the transfer policies in Ogden and vicinity. Where such powers are conferred upon an agent of an insurance company, he becomes the general agent of such company within his district, and his acts performed within the scope of his agency will be binding upon his principal, and his knowledge and consent will be that of his principal. The company is bound, not only by his acts, but also by whatever may be said or done by him regarding the contract or risk. Through him the company has knowledge of every fact in relation to the insurance or contract, and when he issues additional insurance on the same property, he becomes the agent of both companies, and the former company will be conclusively presumed to have knowledge of the additional insurance. If, then, such company fail to avail itself of its right under its contract to object to such additional insurance, and to declare the policy void, so long as there is no apparent danger of loss, it will be estopped from insisting upon a forfeiture of the policy after loss has occurred, because its consent to other insurance was not indorsed thereon in writing. These policies are in a printed form, and, as a general thing, the insured knows little about their conditions and restrictions, but the agent is presumed to know them, and justice and fair dealing will not permit him to lull the insured into a state of security by promises, continue to receive the premiums, and then, when loss occurs, allow the company to deny its liability because the agreement of its agent was not indorsed as required by the insurance contract. In the case at bar the insured requested the agent of the defendant to make the proper indorsement, which he promised to do, but, after having issued the new policy, for some cause

failed to fulfill his agreement, and it is apparent from the record that the agent issued the additional insurance with the full knowledge of the existence of the policy in question. Under these circumstances the clause of the policy now under consideration cannot avail the defendant. A verbal agreement is of as high a legal degree as one in writing, and either one may be varied or abrogated by subsequent agreement, parol or written, and upon principle there appears to be no good reason why this rule should not apply to insurance companies, as well as private individuals. Therefore, the agreement of the agent, by which he promised to indorse on the policy permission for further insurance, is regarded as the agreement of the defendant company and is binding upon it. The fact that it had no actual knowledge of it at the time it was made, and did not actually assent to it, is entirely immaterial, because it was within the scope of the agent's authority to make it. Nor does the fact that the policy in question contained a clause restricting the agent's power to waive any provision or condition of the policy add force or give effect to the clause under consideration, because the agent had the legal capacity to agree that other insurance might be procured on the property, and he having agreed to do this, and then failed to perform, the defendant cannot now be heard to complain because the neglect and failure of the agent was the neglect and failure of the company. It is true the question has been attended with much difficulty, and the decisions of the courts are by no means uniform. Many of the earlier decisions appear to hold the parties rigidly to the terms of the insurance contract. Upon examination of the more recent authorities it seems clear that the rule of strict construction in regard to the terms of an insurance policy has been much relaxed, and the courts now hold that where an insurance company or its agent has been notified of additional insurance, or of changes in the condition of the property, and no objection has been made, the company will be estopped from insisting on a forfeiture, because permission in writing was not indorsed on the policy. An agent who has power to enter into contracts of insurance and issue policies

may also waive forfeiture.<sup>212</sup> . . . . In *Pelkington v. Insurance Company*,<sup>213</sup> Mr. Justice Wagner . . . . , reversing the lower court, said: "The court, by its ruling in striking out the replication, virtually decided that it was absolutely necessary to obtain the written indorsement of the company's assent to the additional insurance before any recovery could be had. There are cases which undoubtedly sustain this position, but the tendency of the modern decisions is to relax and modify this stringent doctrine. It is emphatically averred that the agent was duly notified of the subsequent and additional insurance, and assented to the same. Notice to the agent was notice to the principal, and the company was bound by that notice." <sup>214</sup>

**§ 444. Restrictions in Application on Agent's Authority.**—An application is in itself a mere proposal. It is not a contract. It is not incumbent upon the company to accept it.<sup>215</sup> When accepted it generally becomes a part of the contract and the answers to the interrogatories therein are relied on in determining whether or not the policy should issue. They are made the basis of the contract and are warranted to be true, so far, certainly, as they are material to the risk. Applications for fire policies generally contain other conditions relative to change in risk, etc. Although applications are frequently oral, they are generally in printed form, prepared by the company, and intrusted to agents authorized to solicit insurance. So that while the application is a mere proposition of a party for insurance, it is, when written, an offer controlled largely, if not exclusively, so far as any proposed stipulations

<sup>212</sup> 2 Wood on Fire Insurance, sec. 415.

<sup>213</sup> 55 Mo. 172.

<sup>214</sup> *West v. Insurance Co.*, 10 Utah, 442, per Bartch, J.; citing 2 May on Insurance, secs. 369, 370; *Kahn v. Insurance Co. (Wyo.)*, 34 Pac. Rep. 1059; *Insurance Co. v. Earle*, 33 Mich. 143; *Insurance Co. v. Ruckman*, 127 Ill. 384; 20 N. E. Rep. 77; *Insurance Co. v. Munger*, 49 Kan. 178; 30 Pac. Rep. 120; *Insurance Assn. v. Griffin*, 66 Tex. 232; 18 S. W. Rep. 505; *Cobb v. Insurance Co.*, 11 Kan. 97; *Insurance Co. v. Taylor*, 73 Pa. St. 342; *Weed v. Insurance Co.*, 116 N. Y. 106; 22 N. E. Rep. 229.

<sup>215</sup> *Covenant Mut. B. Assn. v. Conway*, 10 Bradw. (Ill.) 348.



therein are concerned, by the insurer. The agents to whom these blanks are intrusted are held out to the public as possessing, and they do possess, full power to do all things necessary and requisite in relation to the application. If an application contains no limitation upon the powers of an agent, their powers are coextensive with the business intrusted to them.<sup>216</sup> But sometimes the application limits, either expressly or impliedly, the authority of such agent, and the question arises as to what the effect is of such limitations. It is held that if the applicant has actual knowledge of the provisions of the application and of the limited authority of the agent, that he is bound thereby.<sup>217</sup> It is also held that if the form of the application and the questions contained in it show that the answers made by the applicant are to form the basis of the contract of insurance, this alone is sufficient to put the assured upon notice of the extent of the agent's authority.<sup>218</sup> And in *Ryan v. World Mutual Life Insurance Company*,<sup>219</sup> the court declares that the failure to read the application is of itself inexcusable negligence. This case was one of life insurance, and it was claimed that the agent had erroneously written the answers in the application. The court, however, refused to apply the doctrine of estoppel, and said: "Had the truth been stated, no policy would have issued, and as she would have had no better success probably with other companies, we cannot see that she has been misled to her prejudice."<sup>220</sup> Other cases, however, have held directly to the contrary, and set forth the doctrine that even if an application containing such limitations be shown to the applicant, he is not concluded thereby.<sup>221</sup> And in a *Kansas*

<sup>216</sup> *Mutual B. L. Ins. Co. v. Robinson*, 19 U. S. App. 274, per Caldwell, J.; 58 Fed. Rep. 723; 7 U. S. C. C. A. 444.

<sup>217</sup> See *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507; 96 Am. Dec. 65.

<sup>218</sup> *Galbraith v. Arlington Mut. L. Ins. Co.*, 12 Bush (Ky.), 29.

<sup>219</sup> 41 Conn. 168.

<sup>220</sup> See *New York L. Ins. Co. v. Fletcher*, 117 U. S. 529, per Field, J.; *Globe Ins. Co. v. Wolf*, 95 U. S. 329. The first case distinguishes *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222, and *Insurance Co. v. Mahone*, 21 Wall. (U. S.) 152.

<sup>221</sup> See *State Ins. Co. v. Gray*, 44 Kan. 731; *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646.

case<sup>222</sup> it is decided that the company cannot take advantage of false answers written in the application by the agent, which application the owner signs without knowledge of its contents, notwithstanding the application has a contrary stipulation. And where the application prohibits the agent from taking certain risks, this does not operate as notice of a limitation of the authority of an agent, who has full power to accept risks and issue policies, but applies only to soliciting agents.<sup>223</sup> Even if the assured be held to have notice of such prohibitory terms in the application, he may avail himself, as against the company, of the doctrine of estoppel in many cases where the agent has exceeded such pretended limitations of his authority.<sup>224</sup> There would seem to be no valid reason, however, why a less liberal rule should govern in case of limitations in the application on the agent's powers than obtains as to similar inhibitions in the policy,<sup>225</sup> and we have seen, under a prior section, that in the latter case an agent whose powers are broad enough may by acts within the limits of his express or implied authority, bind the company by a waiver of the conditions of the policy, notwithstanding the policy provides contra.

**§ 445. Agency—Custom, etc.—Course of Business—Similar Acts.**—It is well settled that an agency may arise from custom, usage, a course of dealing, or from similar acts, and the principal will be bound where he has sanctioned a course of dealing by the agent, even though the latter had primarily no authority to do the act in question.<sup>226</sup> So the

<sup>222</sup> *Continental Ins. Co. v. Pearce*, 39 Kan. 396; 18 Pac. Rep. 291.

<sup>223</sup> *Howard Ins. Co. v. Owen*, 94 Ky. 197; 13 Ky. L. Rep. 237. It may be stated that the report in the Kentucky Law Reporter presents the case as stated in the text, while in the regular report it does not appear that it was the application which contained the limitation, but a letter of instructions.

<sup>224</sup> See *Continental Ins. Co. v. Chamberlain*, 132 U. S. 304; *Beebe v. Ohio Farmers' Ins. Co.*, 93 Mich. 514; *Robison v. Ohio Farmers' Ins. Co.*, 93 Mich. 533; 53 N. W. Rep. 821.

<sup>225</sup> See *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646.

<sup>226</sup> *Fayles v. National Ins. Co.*, 49 Mo. 380. See *Mound City Mut. L. Ins. Co. v. Huth*, 49 Ala. 429.

company may be bound by the acts and knowledge of an agent in taking a risk, although he is not a regular agent of the company, where he had previously taken insurance for the latter and had been paid his commissions therefor;<sup>227</sup> and where the company for a long time encourages an agent to exercise powers outside his written authority, and so induces the public to rely on his enlarged agency, it cannot after a loss fall back on the agent's written authority to avoid acts done by its encouragement in the general scope of the business.<sup>228</sup>

**§ 446. Agency Custom—Signing for Principal.**—An agency may be inferred from other acts of the company recognizing the agent's authority as in case of payment of losses without objection, on other policies issued by the agent,<sup>229</sup> when such evidence is coupled with proof of the agent's signature.<sup>230</sup> So evidence of prior similar acts in signing policies are admissible to show a subagent's authority to sign a policy.<sup>231</sup> Where an agent of the underwriters has been constantly accustomed to subscribe policies for them, and has subscribed several policies for the assured with the underwriter's knowledge, these acts and the implied ratification warrant the agent's exercise of such assumed authority to subscribe.<sup>232</sup>

**§ 447. Agency—Custom, etc.—Waiver of Conditions.** An agent may also waive conditions and stipulations in the policy when authorized by a course of business, notwithstanding the policy provides to the contrary.<sup>233</sup> So an agent waives the right to enforce a forfeiture for nonpayment of premiums where he has on prior occasions waived such forfeitures for the

<sup>227</sup> *Keith v. Globe Ins. Co.*, 52 Ill. 518.

<sup>228</sup> *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 343.

<sup>229</sup> *Houghton v. Ewbank*, 4 Camp. 88, per Lord Ellenborough.

<sup>230</sup> *Houghton v. Ewbank*, 4 Camp. 88; *Brockelbank v. Sugrue*, 5 Car. & P. 21.

<sup>231</sup> *Grady v. Central Ins. Co.*, 60 Mo. 116.

<sup>232</sup> *Neal v. Irving*, 1 Esp. 61, per Lord Kenyon; contra, *Courteen v. Touse*, 1 Camp. 43, note, per Lord Ellenborough. We believe, however, that the text best expresses the law.

<sup>233</sup> *Insurance Co. v. Norton*, 96 U. S. 234.

same party,<sup>234</sup> and where the conduct, declarations, and course of dealing of the company and its agent warrant the belief that the agent has authority to waive forfeitures and receive overdue premiums, recovery cannot be defeated by a stipulation on the back of the policy to the contrary.<sup>235</sup> So where the general agent was in the habit of crediting the insured with the premium and calling for it when he wanted it, and the insured was induced, after the agent died, to take a paid-up policy under the belief that the original policy had lapsed, a recovery may be had on the original policy;<sup>236</sup> and a tender to the local agent of an annual premium, when due, will prevent a forfeiture of the policy where the insured has been in the habit of paying such premium to the local agent, although the policy provides for payment at the company's principal office, and even though the company had failed to place the receipt for the premium in such agent's hands.<sup>237</sup> So the company may be bound by a custom of the agent to give credit for the premium, although the renewal receipt is retained in the agent's office at the request of the insured.<sup>238</sup> And mutual benefit associations may be bound by the acts and declarations of its agent by which a member is induced to believe that the time for payment of assessments would be extended as in former cases, even though the secretary and manager of the association has told the assured that such assessments were overdue.<sup>239</sup> And the same rule applies where the agent has been in the

<sup>234</sup> *Alexander v. Continental Ins. Co.*, 67 Wis. 422; 58 Am. Rep. 869, 873.

<sup>235</sup> *Mound City L. Ins. Co. v. Huth*, 49 Ala. 529; *Insurance Co. v. Norton*, 96 U. S. 234; *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521; 44 N. W. Rep. 828; *Wyman v. Phoenix Mut. L. Ins. Co.*, 119 N. Y. 274; 45 Hun (N. Y.), 184; 29 St. R. 567; 23 N. E. Rep. 907; *Insurance Co. v. Wolff*, 95 U. S. 326; *Unsell v. Hartford L. & A. Ins. Co.*, 32 Fed. Rep. 443. See *Hastings v. Brooklyn L. Ins. Co.*, 138 N. Y. 473; 53 St. R. 63; *Kenyon v. Knights Templar etc. Assn.*, 122 N. Y. 247; *Conway v. Phoenix Mut. L. Ins. Co.*, 140 N. Y. 79; 55 St. R. 571; *De Frece v. National L. Ins. Co.*, 136 N. Y. 144; 48 St. R. 909.

<sup>236</sup> *People v. Globe Mut. L. Ins. Co.*, 65 How. Pr. (N. Y.) 239.

<sup>237</sup> *Morey v. New York L. Ins. Co.*, 2 Woods (C. C.), 663.

<sup>238</sup> *Tennant v. Travelers' Ins. Co.*, 31 Fed. Rep. 322.

<sup>239</sup> *Odd Fellows' Mut. Aid Assn. v. Sweetser*, 117 Ind. 97; 19 N. E. Rep. 722.

society's employ for years, and his acts have been sanctioned by the company, where there is nothing in the act of incorporation to restrict the company to written contracts, and in such case the agent may by his representations continue the policy in force for another year.<sup>240</sup> Where the evidence does not show that there was any distinction made in granting extensions for the payment of premiums before or after maturity of the notes, and the practice of the agent has been to make extensions for such payment, the fact that it was granted after maturity of the note makes no difference, since it is binding in either case.<sup>241</sup> In such cases as the above the act is, as to the assured, the same as if the agent had a special permission or grant of authority from the company to so act, and the act has the same force as if executed under an original express authority.<sup>242</sup> In a recent case, which was an action to recover premiums paid on a policy of life insurance, it was held, on the question whether the defendant's agent was authorized to allow a rebate of premiums, that evidence was admissible that the agent had made contracts with other policyholders, and that the company had accepted their contracts for such rebate and recognized the agent's authority to make them. But there is no recognition of such authority where it appears that the company had repudiated the agent's contracts, so far as the rebate of premium was concerned, and a settlement had been made with the policy holders after suit brought on the basis of the risk incurred by the company during the continuance of their policies, but an acceptance of the premium thereafter from the defendant, less the rebate, is a ratification of the agent's acts. But evidence is inadmissible that a year after plaintiff's contract the agent made agreements for rebate with other policy holders in a distant state, of which he had notified the office, but stating that the amount of rebate should be deducted from his commissions, and the com-

<sup>240</sup> Zell v. Herman Farmers' Mut. Ins. Co., 75 Wis. 52; 44 N. W. Rep. 828.

<sup>241</sup> Insurance Co. v. Norton, 96 U. S. 234.

<sup>242</sup> See Wyman v. Phoenix Mut. Ins. Co., 119 N. Y. 274; 45 Hun (N. Y.), 184; 29 St. R. 567; 23 N. E. Rep. 907; Brockelbank v. Sugrue, 5 Car. & P. 21; 1 Wood & Rob. 102; 1 Barn. & Adol. 81.

pany indorsed its approval on the letter written by the agent to it stating these facts.<sup>243</sup>

§ 448. **Agency—Custom—Alteration of Contract.**—An agent's authority to modify or alter a policy by an oral or written agreement may be inferred from a course of dealing acquiesced in by the principal.<sup>244</sup> This is illustrated by a case decided by Lord Tenterden, where it was held that the agent had authority to indorse over his signature a memorandum on the policy, permitting a change of voyage, where he was in the habit of so acting and notifying the company thereof. This case further holds that it was unnecessary for the plaintiff to produce the other policies on which similar memorandums had been so indorsed and signed.<sup>245</sup> But in such case the evidence must show, in order to bind the principal, at least several cases in which the agent, without asking the sanction of his acts by the principal, had made alterations of a like nature, on which the principal had acted, and in which he had acquiesced when such alterations came to his knowledge; or it must tend to prove that although communicated by the agent, they were acquiesced in as acts which he was competent to perform, and as binding on his principal; or that he was held out to the public as authorized to do such acts.<sup>246</sup>

§ 449. **Agency—Custom, etc.—Submission to Award.** The previous acts of an agent may be such as to raise an implication of authority to submit to an award.<sup>247</sup>

§ 450. **Agency—Custom—Proofs of Loss.**—Where a local agent has been permitted on prior occasions to receive

<sup>243</sup> *Thompson v. New York L. Ins. Co.*, 21 Or. 466; 28 Pac. Rep. 623.

<sup>244</sup> See *Day v. Mechanics' & Traders' Ins. Co.*, 88 Mo. 325; 57 Am. Rep. 416.

<sup>245</sup> *Brockelbank v. Sugrue*, 5 Car. & P. 21. See *Bunten v. Orient etc. Ins. Co.*, 4 Bosw. 254.

<sup>246</sup> *Bunten v. Orient etc. Ins. Co.*, 4 Bosw. (N. Y.) 254. See *Peck v. New London etc. Ins. Co.*, 22 Conn. 575; *Clevenger v. Mutual L. Ins. Co.*, 2 Dak. 114. See *Fayles v. National Ins. Co.*, 49 Mo. 380.

<sup>247</sup> *Goodson v. Brooke*, 4 Camp. 163.

proofs of loss for the purpose of furnishing the particular statement required, he may by his statements waive a delay in furnishing such proofs, although a provision of the policy requires a waiver to be in writing, signed by an officer of the company.<sup>248</sup>

§ 451. **Agency—Custom, etc.—Surrender of Policy.**—An agent may accept a surrender of a policy where he has been accustomed to do so with the consent of the company, and such surrender is in effect a cancellation of the policy, even though the agent fails to forward it to the company as he was bound to do.<sup>249</sup>

§ 452. **Agency—Custom—Transfer of Insurance.**—A transfer of an insurance from one company to another, made by an agent in accordance with a custom of insurance brokers of that place, may bind the company in which it is placed where the agent represents both companies and acted in good faith, one company having refused to carry the risk.<sup>250</sup>

§ 453. **Agency—Custom, etc.—Negotiation of Drafts.**—Where the general agent is authorized to settle claims and is in the habit of drawing drafts on the company for the same, evidence that the company has honored such drafts is admissible in an action on one of them.<sup>251</sup>

§ 454. **Agency—Custom, etc.—Cancellation of Policy.**—Evidence is inadmissible to show a local custom of insurance agents to cancel their policies after their agency had expired, since such custom is unreasonable and void, and tends to subvert the principles underlying the relations of principal and agent;<sup>252</sup> nor is it competent to prove a custom that notice to the broker operates to cancel a policy.<sup>253</sup>

<sup>248</sup> *Allen v. Farmers' etc. Ins. Co.*, 6 Thomp. & C. (N. Y.) 591.

<sup>249</sup> *Train v. Holland Purchase Ins. Co.*, 68 N. Y. 208.

<sup>250</sup> *Connecticut F. Ins. Co. v. Kavanagh* (Mont. L. Rep.), 5 Sup. Ct. 262.

<sup>251</sup> *Fayles v. National Ins. Co.*, 49 Mo. 380.

<sup>252</sup> *Merchants' Ins. Co. v. Prince*, 50 Minn. 53; 52 N. W. Rep. 131.

<sup>253</sup> *Grace v. American Cent. Ins. Co.*, 109 U. S. 278. See *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290.

§ 455. **Ratification of Agent's Acts—Generally.**—It is a principle which may be universally applied to the law of agency that a principal may ratify the unauthorized acts of his agent. Such ratification may be express or implied. It rests, however, upon knowledge of the facts by the principal, for the latter must be cognizant of what has been done, or must have intentionally accepted the benefit without inquiry. No ratification can be implied of an act of which the principal was ignorant at the time of the claimed ratification, or where ratification was made under a misapprehension of the full scope of the act.<sup>254</sup> But it is another general principle that a ratification affords presumptive evidence of everything necessary to sustain it. It supposes a knowledge of the thing ratified, and, in case of a contract, the inference from the ratification is that its terms were known, and to rebut this inference evidence of a mistake or misapprehension is required.<sup>255</sup> If the authority of an agent arises by inference from the adoption or recognition of his acts, the company is bound by such acts.<sup>256</sup>

§ 456. **Ratification of Agent's Acts Operates Retroactively.**—The ratification or adoption of an agent's acts operates retroactively, and relates back to the original transaction, and has the same force and effect as if done under

<sup>254</sup> *Wells v. Hickox*, 1 Kan. App. 490; 40 Pac. Rep. 821; *Miller v. Board of Education*, 44 Cal. 166; *Dean v. Bassett*, 57 Cal. 640; *Terry v. Providence Fund Soc.*, 13 Ind. App. 1; 41 N. E. Rep. 18; *Hughes v. Insurance Co.*, 40 Neb. 626; *Jewell Nursery Co. v. State*, 5 S. Dak. 623; 59 N. W. Rep. 1025; *Ætna Ins. Co. v. Northwestern Iron Co.*, 21 Wis. 458; *Zoeblisch v. Rauch*, 133 Pa. St. 532. See *Spooner v. Thompson*, 48 Vt. 259; *Holm v. Bennett*, 43 Neb. 808; 62 N. W. Rep. 194; notes, 22 Am. St. Rep. 190; 5 Am. St. Rep. 109; 79 Am. Dec. 387; 27 Am. Dec. 343.

<sup>255</sup> *Blen v. Bear River etc. Co.*, 20 Cal. 602.

<sup>256</sup> *Mowry v. World Mut. L. Ins. Co.*, 74 N. Y. 360; *Terry v. Providence Fund Ins. Co.*, 13 Ind. App. 1; 41 N. E. Rep. 18. See *Illinois F. Ins. Co. v. Stanton*, 57 Ill. 354; *Burlington Ins. Co. v. Threlkeld*, 60 Ark. 539; *Warren v. Ocean Ins. Co.*, 16 Me. 439; 33 Am. Dec. 674; *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 342; *Franklin v. Globe Mut. L. Ins. Co.*, 52 Mo. 461; *Goldbeck v. Kensington Nat. Bank*, 147 Pa. St. 267.



an original authorization, except perhaps where the rights of strangers may be prejudiced.<sup>257</sup>

**§ 457. Ratification of Agent's Acts Must be Entire.** The ratification must be entire; therefore, a ratification of part ratifies the whole, for a part cannot be rejected, as to the same transaction, and a part ratified.<sup>258</sup>

**§ 458. Ratification of Agent's Act Must be One Which Principal could have Authorized.**—Ratification must be of an act which the principal could himself have authorized.<sup>259</sup> So an agent may bind the company by a ratification of another's act where such ratification is within the scope of the agent's authority;<sup>260</sup> and the acts of a mere stranger in procuring insurance may be ratified by the general agent by receiving the premium from him, and giving him the policy to deliver, and the company is bound by the policy thus effected,<sup>261</sup> although a vote to allow losses which is passed at a meeting of directors of an insurance company where there was not a quorum present, may be ratified by a subsequent valid vote to make an assessment to pay such losses,<sup>262</sup> and where the act is one in disregard of formalities prescribed by

<sup>257</sup> *Hughes v. Insurance Co. of North America*, 40 Neb. 626; *Lowry v. Harris*, 12 Minn. 255; *Fleckner v. United States Bank*, 8 Wheat. 363, per Story, J.; *Excelsior F. Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; *Heermans v. Clarkson*, 64 N. Y. 171; *Clement v. Jones*, 12 Mass. 60; *Mechem on Agency*, ed. 1889, sec. 167; 1 *Chitty on Contracts*, 11th ed., 290, et seq.; *Angell & Ames on Corporations*, 9th ed., sec. 304.

<sup>258</sup> *Rogers v. Empkle Hardware Co.*, 24 Neb. 653; 39 N. W. Rep. 844; *Farmers' Loan & Trust Co. v. Walworth*, 1 N. Y. (1 Comst.) 433; *Southern Express Co. v. Palmer*, 48 Ga. 85; *Benedict v. Smith*, 10 Paige (N. Y.), 127; *Wells v. Hickox*, 1 Kan. App. 485; 40 Pac. Rep. 821; *Winpenny v. French*, 18 Ohio St. 469; *Rolling Stock Co. v. Railroad*, 34 Ohio St. 450, 463; *Mechem on Agency*, ed. 1889, sec. 130. But see *Miller v. Board of Education*, 44 Cal. 166.

<sup>259</sup> *O'Connor v. Arnold*, 53 Ind. 205; *Swett v. Relief Soc.*, 78 Me. 545; *Mechem on Agency*, ed. 1889, sec. 126; citing *Zottman v. San Francisco*, 20 Cal. 96; 81 Am. Dec. 96, and other cases.

<sup>260</sup> *Mound City Mut. L. Ins. Co. v. Huth*, 49 Ala. 530.

<sup>261</sup> *Camden C. Oil Co. v. Ohio Ins. Co.*, 5 Cin. L. Bull. 193.

<sup>262</sup> *Atlantic Ins. Co. v. Sanders*, 36 N. H. 252; contra, *Price v. Grand Rapids R. R. Co.*, 13 Ind. 58.

the charter, and the benefits have been derived from the subject matter of the contract, there is every reasonable presumption in favor of validity of the contract.<sup>263</sup>

**§ 459. Ratification of Agent's Acts—Signing for Principal.**—The company ratifies an agent's assumed authority where the latter signs an application as agent, and the former, on receipt thereof, indorses his name on the policy issued thereon.<sup>264</sup> So if an agent signs an approval of an assignment "for secretary," and immediately reports the same to the company, it will operate as the act of the secretary,<sup>265</sup> and where a subagent signs a policy for the agent, who thereafter takes the policy, redelivers it, and receives the premium with full knowledge of the fact, it is a ratification of the subagent's assumed authority.<sup>266</sup>

**§ 460. Ratification of Agent's Acts—The Premium.** A waiver by an agent of nonpayment of the premium on the specified date is ratified by the acceptance thereafter by the company, from its agents, of such payments without making objection to the assured, notwithstanding the policy provides that agents cannot waive such nonpayment,<sup>267</sup> and the company is bound by the act of its agent in extending the time for the payment of premiums where it has been accustomed to ratify such act by accepting the premiums.<sup>268</sup> The company may likewise ratify the agent's acts in receiving overdue premiums by such acceptance or retention of the premium.<sup>269</sup>

<sup>263</sup> *In re Post of London Assur. Co.*, 5 De G., M. & G. 465; *Walter's case*, 3 De G. & S. 149. That their principal's conduct should be liberally construed in favor of ratification, see *Wilson v. Forder*, 20 Ohio St. 97; citing *Story on Agency*, sec. 293.

<sup>264</sup> *Packard v. Dorchester Mut. F. Ins. Co.*, 77 Me. 144; 1 East. Rep. 138. See *Dunn v. Grand Trunk Ry.*, 58 Me. 187; 4 Am. Rep. 267.

<sup>265</sup> *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 343.

<sup>266</sup> *Grady v. American Cent. Ins. Co.*, 60 Mo. 116.

<sup>267</sup> *National L. Ins. Co. v. Tullidge*, 39 Ohio St. 240.

<sup>268</sup> *Wyman v. Phoenix etc. Ins. Co.*, 119 N. Y. 274; 45 Hun (N. Y.), 184; 23 N. E. Rep. 907.

<sup>269</sup> *Mutual B. L. Ins. Co. v. Robertson*, 59 Ill. 123; 14 Am. Rep. 8;

And there is a ratification of the agent's acts in accepting a promissory note for the premium where the company accepts proofs of death, and transmits a draft in payment of the loss which is diverted by the agent's fraud.<sup>270</sup> But an agent cannot ratify a void contract by receiving the premium,<sup>271</sup> and the company does not, by receiving the money from an agent without knowledge of the facts, ratify his acts in accepting the unpaid part of a premium after death of the insured, the policy having been forfeited.<sup>272</sup>

**§ 461. Ratification of Agent's Acts—Retaining Benefits.**—A ratification of an agent's acts may be inferred from the act of the principal in accepting and retaining the benefits arising therefrom, with knowledge thereof,<sup>273</sup> and a foreign company, by availing itself of the benefits of acts of persons acting for them, is bound thereby.<sup>274</sup> So an inference of ratification may arise where the principal's acts and conduct are inconsistent with any other hypothesis.<sup>275</sup> So where the company receives and retains the premium received from the general agent, it is estopped to set up its rules forbidding insuring that class of persons to which the assured belongs.<sup>276</sup> In

*Northwestern Iron Co. v. Aetna Ins. Co.*, 26 Wis. 78. See *Zell v. Herman Farmers' Mut. Ins. Co.*, 75 Wis. 521; 44 N. W. Rep. 828; *Tennant v. Travelers' Ins. Co.*, 31 Fed. Rep. 322.

<sup>270</sup> *New York L. Ins. Co. v. McGowan*, 18 Kan. 300.

<sup>271</sup> *Swett v. Citizens' Mut. Relief Soc.*, 78 Me. 541, 545, per Libbey, J.

<sup>272</sup> *Union Mut. L. Ins. Co. v. McMillen*, 24 Ohio St. 67.

<sup>273</sup> *Rodgers v. Empkie Hardware Co.*, 24 Neb. 655, per Maxwell, J.; 39 N. W. Rep. 844; *Rich v. State National Bank*, 7 Neb. 201; 29 Am. Rep. 385, 386; *Ely v. James*, 123 Mass. 36; *Wilson v. Forder*, 20 Ohio St. 97, per White, J. See *Haar v. Industrial B. Assn.*, 71 Hun (N. Y.), 554; 54 St. R. 800; 24 N. Y. Supp. 1035; *Fitch v. Lewiston Steam Mill Co.*, 80 Me. 34, 36, 37; 12 Atl. Rep. 732; *National L. Ins. Co. v. Minch*, 5 Thomp. & C. 545; 53 N. Y. 144; *Tuscaloosa Cotton Seed Oil Co. v. Perry*, 85 Ala. 158; 4 S. Rep. 655. But see *Woodruff v. Rochester etc. Co.*, 108 N. Y. 39; 14 N. E. Rep. 332; *Boynton v. Lynn Gas. Light Co.*, 124 Mass. 197.

<sup>274</sup> *Continental Ins. Co. v. Buckman*, 127 Ill. 364.

<sup>275</sup> *Maddox v. Bevan*, 39 Md. 485. See *Ketchum v. Verdell*, 42 Ga. 534.

<sup>276</sup> *Esch v. Home Ins. Co.*, 78 Iowa, 334; 43 N. W. Rep. 229.

another case A made a written application, which the agent, without the knowledge of A, copied into the blanks of another company for which he was also agent. The company issued a policy and received several premiums thereon. In an action on the policy, it was held that the company was estopped to set up that the application was not made or signed by A.<sup>277</sup> And a society was held bound by an agent's acts in a case where an applicant was within two months of the age required by the by-laws of a mutual benefit society, and the agent told him he was near enough, and that it would make no difference, in consequence of which he paid the admission fee and two advance assessments, which the association retained after suit was brought.<sup>278</sup> So where a policy is issued upon an unoccupied house, and the agent knows such fact and receives an extra premium, usual in such risks, which premium the company accepts and does not offer to return, there is a waiver of a condition requiring written consent of the company, although the policy provides that no agent may waive the conditions of the policy.<sup>279</sup> But the receipt and retention of the money by the company does not operate as a ratification of the agent's acts in receiving an overdue premium and reviving the policy, where there is no proof that the company had knowledge of the facts.<sup>280</sup>

**§ 462. Ratification of Agent's Acts—Neglect to Disaffirm.**—A ratification may also be implied from the neglect of the company to promptly repudiate the agent's acts done within the scope of his authority even though the policy prohibits the doing of such acts by the agent,<sup>281</sup> for it is incum-

<sup>277</sup> *Bohnrigger v. Empire Mut. L. Ins. Co.*, 2 Thomp. & C. (N. Y.) 610.

<sup>278</sup> *Gray v. National B. Assn.*, 111 Ind. 531; 11 N. E. Rep. 477. The statute, however (Rev. Stat. Ind. 1881, sec. 3727), in this case gave the society power to insure the life of any person without regard to age.

<sup>279</sup> *Haight v. Continental Ins. Co.*, 92 N. Y. 51.

<sup>280</sup> *Busby v. North American L. Ins. Co.*, 40 Md. 572; 17 Am. Rep. 634.

<sup>281</sup> *Niagara Ins. Co. v. Lee*, 73 Tex. 641, 646; 11 S. W. Rep. 1024, relying upon *Morrison v. Insurance Co.*, 69 Tex. 303.

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bent upon the principal to disaffirm an agent's acts or dissent upon receiving notice thereof, otherwise he will be bound thereby.<sup>282</sup> So where the policy does not require the payment of the premium in money, and the agent accepts, in lieu of money, the promise of the broker to whom the insured had paid the premium, the silence of the company, after knowledge of the fact, will constitute a ratification of the agent's act, and the company cannot cancel the policy without repaying the assured the premium.<sup>283</sup> And if the agent of the insurers makes an adjustment of a loss, they are bound thereby where they examine it and do not dissent.<sup>284</sup> An insurance company may, by its failure to object to delays in proofs of death, ratify the acts of its agent, who assumes to represent the company in receiving such proofs and in granting delays, in furnishing the same, although the policy requires that notice shall be given the home office.<sup>285</sup> So the company is bound where its agent receives proofs of loss which are furnished too late and are formally inaccurate, where he forwards the same to the company, which does not object, but permits the agent to repair another building covered by the same policy, and allows the amount of his expenditures thereon.<sup>286</sup> But it is held that the company is not estopped where the written notice of loss given after the expiration of the time limited stated that the insured had given oral notice of loss to the agent, although the company does not object at the time.<sup>287</sup> Where an agent indorsed a consent to an assignment upon a policy after its forfeiture therefor, and with full knowledge of the facts, and reported it to the company, which made no objection, as was its custom when the agent's acts were disapproved, the company was held bound by

<sup>282</sup> See *Bennett v. Maryland F. Ins. Co.*, 14 Blatchf. (C. C.) 422; 17 Alb. L. J. 363; *Caines v. Bleecker*, 12 Johns. (N. Y.) 300; *Saveland v. Green*, 40 Wis. 431; *Armstrong v. Gilchrist*, 2 Johns. Cas. (N. Y.) 424; *Hawkins v. Lange*, 22 Minn. 557; *Penn v. Evans*, 28 La. Ann. 578.

<sup>283</sup> *Bennett v. Maryland F. Ins. Co.*, 14 Blatchf. (C. C.) 422.

<sup>284</sup> *Bordes v. Hallett*, 1 Caines (N. Y.), 444 b.

<sup>285</sup> *Travelers' Ins. Co. v. Edwards*, 122 U. S. 457.

<sup>286</sup> *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241.

<sup>287</sup> *Connell v. Milwaukee etc. Ins. Co.*, 18 Wis. 387.

such waiver by its agent.<sup>288</sup> In some of the cases of agency a distinction is made between transactions in progress and those completed in determining how far silence or neglect to dissent operates as a ratification, it being held in the former case that the principal must dissent within a reasonable time after notice, and in the latter, that although silence may afford an inference of ratification, no estoppel can arise against the principal.<sup>289</sup> So in cases where a party acts for another and no relation of principal and agent exists between them, the failure of the intended principal to dissent, upon receiving notice of the assumed agent's acts will often operate to effect an adoption of such acts and establish by ratification the relation of principal and agent.<sup>290</sup>

**§ 463. Ratification—Agent Must have Assumed to Act for Claimed Principal.**—Although an insurance company may ratify the unauthorized act of a party who professes to act as its agent in procuring insurance,<sup>291</sup> it is a general rule that the agent must have assumed to act in behalf of the person who is claimed to have ratified.<sup>292</sup> Mr. Evans says: "That no contract is valid unless there are parties existing at the time who are capable of contracting, is an elementary principle of the law of contracts.<sup>293</sup> To this principle the rule which makes the validity of a ratification depend upon the existence of the person who ratifies appears manifestly to be a corollary."<sup>294</sup>

<sup>288</sup> *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 464, 472; 12 Atl. Rep. 668.

<sup>289</sup> See *Union Gold Mining Co. v. Rocky Mountain Nat. Bank*, 2 Col. 248, 565; 96 U. S. (6 Otto) 640; *Meyer v. Morgan*, 51 Miss. 21; 24 Am. Rep. 617; *Hawkins v. Lange*, 22 Minn. 557. As to ratification of unauthorized acts by silence, see note 79 Am. Dec. 387-89.

<sup>290</sup> See Story on Agency, sec. 258. See discussion of this point, 2 Duer on Insurance, ed. 1846, 178, et seq.

<sup>291</sup> *Farmers' Mut. Ins. Co. v. Marshall*, 29 Vt. 23.

<sup>292</sup> *Mitchell v. Minnesota F. Assn.*, 48 Minn. 278; 51 N. W. Rep. 608; *Roby v. Cassett*, 78 Ill. 638, 642; *Commercial Bank v. Jones*, 18 Tex. 811; *Condit v. Baldwin*, 21 N. Y. 219, 225; 78 Am. Dec. 137; *Alldred v. Bray*, 41 Mo. 484.

<sup>293</sup> See *Gulm v. London & Lancashire F. Ins. Co.*, 12 Com. B., N. S., 694.

<sup>294</sup> Ewell's Evans on Agency, 75. See, also, *Id.* 72, et seq.

And where the party, during the act for which a ratification is claimed, neither has, nor professes to have, authority to represent the party sought to be charged, no ratification can be implied from the latter's subsequent assent.<sup>295</sup> So the court, per Collins, J., says in a Minnesota case: "But the law is, that where the party acting has no authority to act for the third party, and does not profess at the time to act for him, the subsequent assent of such third party to be bound as a principal has no operation, and ratification is only effectual when the act is done by a person professedly acting as the agent of the party sought to be charged as principal."<sup>296</sup>

**§ 464. Ratification of Agent's Acts—Other Insurance.**—A company may be bound by the acts of its agent in waiving a condition providing against other insurance, where it acquiesces in such acts with full knowledge thereof, even though the policy provides that the agent has no power to bind the company in violation of the printed terms of the policy. Thus the principal was held where the general agent knew of other insurance, and promised to make the proper indorsement of the same, and just before loss arranged for renewal of the policy at its expiration, and made a memorandum thereof, although he never made the indorsement.<sup>297</sup> So the company is bound by acts of its local agent, done within the scope of his authority, where he expressly agrees with the insured to obtain, and does obtain, additional insurance, after which, with a full knowledge of the facts, the company receives the premium, notwithstanding a condition in the policy that it shall be void in case additional insurance is obtained without notice thereof to the company, and an acknowledgment thereof in writing. In such case there is a waiver of the condition.<sup>298</sup>

<sup>295</sup> *Mitchell v. Minnesota F. Assn.*, 48 Minn. 278; 51 N. W. Rep. 608.

<sup>296</sup> *Id.* 284.

<sup>297</sup> *Morrisson v. Insurance Co. of North America*, 69 Tex. 353.

<sup>298</sup> *Horwitz v. Equitable Mut. Ins. Co.*, 40 Mo. 557; 93 Am. Dec. 321 (local agent).

§ 465. **Power to Bind Insurance Company by Contracts Other than Those of Insurance.**—It is held in a New York case decided under an act of incorporation of an insurance and loan company, that a purchase by an agent is a purchase by the company employing him.<sup>299</sup> But it is declared elsewhere that a general district agent for a stated territory, with authority to solicit and forward applications, and who is to receive a stated compensation, has no implied authority to bind the company by a purchase of furniture for his office, as such an act is without the scope of his employment, even though he advertises his agency as a branch office, it not appearing that the company had knowledge of such fact.<sup>300</sup> Nor can an agent appointed in another city bind the company for the rent of an office where he receives commissions in payment for his services and the agency is revocable at pleasure;<sup>301</sup> nor has a general agent, as such, any power to bind the company by representations respecting the purchase of the goodwill of a local agency and the right of the vendee to sell the same thereafter.<sup>302</sup> And a local agent, who has authority to receive proposals for insurance, to countersign and renew policies, and receive premiums, has no authority to draw and negotiate a draft drawn in full settlement of a claim under the policy, notwithstanding the company's secretary authorized the agent by letter to "make draft to the order of the court, for the benefit of whom it may concern," for the sum due. This was so held in an action by the person who cashed the draft where the agent had absconded with the money.<sup>303</sup> Nor has an agent any implied power to institute criminal proceedings so as to bind the company, although in matters relating to the ascertainment of

<sup>299</sup> *Farmers' F. Ins. Co. v. Edwards*, 26 Wend. (N. Y.) 541; 21 Wend. (N. Y.) 467 (the clause was, "In all cases where the said corporations have become the purchasers of any real estate upon which they have made loans," etc.).

<sup>300</sup> *Beebe v. Equitable Mut. L. & E. Assn.*, 76 Iowa, 129; 40 N. W. Rep. 122.

<sup>301</sup> *Brander v. Columbia Ins. Co.*, 2 Grant (Pa.), 470.

<sup>302</sup> *Barber v. Connecticut Mut. L. Ins. Co.*, 15 Fed. Rep. 312.

<sup>303</sup> *Commercial Assur. Co. v. Rector*, 55 Ark. 630; 17 S. W. Rep. 878.



the cause of a loss under a policy he may have authority to employ a detective, as the insurer in such case may have a private interest to subserve, distinct from that of the public at large.<sup>304</sup>

Where a party applies for a renewal of a loan and the local agent of a foreign company says that he will communicate with the home office, and thereafter grants the application, the applicant is justified in assuming that the agent had authority to so act.<sup>305</sup>

<sup>304</sup> *Norman v. Insurance Co.* (Ct. Ill.), 4 Ins. L. J. 827.

<sup>305</sup> *Union Mut. L. Ins. Co. v. Slee*, 110 Ill. 35.

## CHAPTER XIX.

### AGENT OF INSURER—POWERS PRIOR TO ISSUE OF POLICY.

- § 472. Powers of agent concerning the application—Misrepresentations.
- § 473. Misrepresentations of agent—Continued.
- § 474. Misrepresentations by agent in application: Statements made warranties.
- § 475. Where true answers are given but agent inserts different ones in application.
- § 476. Same subject: Cases.
- § 477. Where answers are unintentionally incorrect: Agent's knowledge.
- § 478. False answers by clerk of agent.
- § 479. Misrepresentations: Application signed by agent without applicant's authority.
- § 480. Where agent agrees to note facts in application.
- § 481. Omission or negligence of agent in filling out application.
- § 482. View that not question of waiver and estoppel, but whether condition attached.
- § 483. Mistake of agent in filling out application.
- § 484. Misrepresentations by agent with full knowledge of facts.
- § 485. Misrepresentations by agent: Applicant signs in blank.
- § 486. Misrepresentations by agent: Application sent unsigned to company.
- § 487. Where agent fills out application without inquiry; or of his own knowledge.
- § 488. Where applicant has no knowledge of facts and agent fills out application.
- § 489. Misrepresentations by agent: Where applicant signs application without reading or knowing contents.
- § 490. Misrepresentations by agent: Where applicant is illiterate.
- § 491. Fraud of agent in preparing application.
- § 492. Agent's knowledge of falsity or incorrectness of applicant's statements.
- § 493. Where applicant is assured by agent that application is correct.
- § 494. Misrepresentations by agent: Insured may rescind.
- § 495. Broker's misrepresentations: Application.
- § 496. Oral application: Agent's knowledge.

- § 497. Information obtained from others by agent: Application.
- § 498. Where agent writes down such answers as he deems material: Application.
- § 499. Where agent dictates or advises the answers: Application.
- § 500. Where agent tells assured no answers are necessary.
- § 501. Policy issued on agent's representations or recommendation.
- § 502. Where application gives notice of agent's limited authority.
- § 503. Misrepresentations by agent: Copy of application or by-laws annexed.
- § 504. Misrepresentation: Agent's collusion with applicant.
- § 505. Misrepresentation by agents: Parol evidence admissible.
- § 506. Same subject: The opposing view.
- § 507. Same subject: When agent's authority is limited.
- § 508. Agents of insured: When this provision in the policy inoperative.
- § 509. Same subject: Mutual companies and benefit societies.
- § 510. Authority of subordinate officers of benefit association to waive requirements as to application.
- § 511. Agents of insured: Knowledge of insured.
- § 512. Statutes: Soliciting agent is company's agent.
- § 513. Cases holding that agent is agent of insured.
- § 514. Misrepresentations of insurer's agent to induce insurance.
- § 515. Notice to and knowledge of agent generally.
- § 516. Presumption as to agent's knowledge.
- § 517. Reformation of policy to conform with actual contract.

**§ 472. Powers of Agent Concerning the Application—Misrepresentations.**—Where an agent acting within the scope of his authority fills out an application for a policy, his acts and representations are those of the company, and if in such case the agent, by reason of mistake, neglect, omission, fraud, or otherwise, inserts erroneous answers in such application, such misrepresentations are not binding upon the assured, unless he has knowledge thereof or there has been fraud or fault on his part, or collusion with the agent. And knowledge by him that the answers are incorrect does not always vitiate the contract, as in case he has been advised that the answers in question were the proper ones to make. The cases are very numerous and the question has been much discussed, but the weight of authority supports the rule above given. This rule is founded upon legal, as well as equitable, grounds. The agents represent and act for the company. It is a fair presumption that they have a more intimate knowledge of the

business of insurance than those with whom they deal; that they understand the requirements of the company, and are competent to properly and legally fill out applications and such other papers as they are intrusted with by the company; that they are familiar with the details that should be set forth in the application. These are matters with which the general public are not as a rule familiar, and in most cases are entirely ignorant of. They rely, and have a right to rely, upon the agents as possessing the requisite skill and knowledge in such matters, and as possessing the authority which they assume to possess, and the exercise of which the company itself sanctions. It sends its agents abroad to solicit insurance, and holds them out to the public as possessing authority to represent them in soliciting insurance and in the matter of the application. Again, the forms and requirements of different companies are different. When, therefore, an agent, duly authorized to act for the company in soliciting insurance, assumes to know what information the principal possesses, and with knowledge of the facts draws what he asserts to be, or leads the applicant to believe, is the proper form of an application, the applicant has a right to rely upon his skill and knowledge, upon his presumed duty to his principal, upon his honesty, and to believe that the paper which he is induced to sign is legally and correctly drawn. Such applicant is further warranted in his belief by the fact that the principal for whom the agent acts accepts such paper and forwards a contract based thereon, which purports to give him the indemnity which the agent has induced him to apply for and obtain, and for which the company receives and retains the premium. To hold that after the property is destroyed the company could repudiate such contract on the ground of its agent's unskillfulness, mistake, carelessness, or fraud, would be unjust to the assured.<sup>1</sup> And the decisions up-

<sup>1</sup> *Ætna Ins. Co. v. Olmstead*, 21 Mich. 246; 4 Am. Rep. 483, per Cooley, J.; *Continental Ins. Co. v. Chew* (Ind. A. C. 1894), 38 N. E. Rep. 417; *Campbell v. Merchants' etc. Ins. Co.*, 37 N. H. 35; 72 Am. Dec. 324, per Eastman J.; *Home Fire Ins. Co. v. Fallon* (Neb. 1895), 63 N. W. Rep. 860; 24 Ins. L. J. 690; *Miller v. Phoenix Mut. Life Ins. Co.* 107 N. Y. 296, per Ruger, C. J.; *Kausal v. Minnesota Farmers' Mut. F. Ins. Assn.*, 31 Minn. 17, per Mitchell, J.; 47 Am. Rep. 776;

holding this doctrine may rest either upon waiver or estoppel.<sup>2</sup> In a New York case<sup>3</sup> the policy contained this condition: "Any interest in property insured not absolute or that is less than a perfect title, or if a building is insured that is on leased ground, the same must be specifically represented to the company and expressed in this policy in writing, otherwise the insurance shall be void." Part of the insured property was on leased ground, and the insurance agent was told of that fact, but it was not expressed in the policy in writing. The defendant company claimed that thereby the insurance was void. The court, in a well-considered opinion, says: "We cannot suppose that either plaintiff or defendant would do the utterly absurd thing of making, with deliberation and knowledge, a contract that was void from inception, and was in contradiction of the facts and statements of the negotiation." It is plain that the plaintiff and the agent meant to contract, and did contract, for the insurance of that building as a building on leased land.<sup>4</sup> Hence we are not surprised that the plaintiff claims that the fact that the building was on leased ground was made known to the defendant when the policy was applied for, and that the policy was delivered and premium accepted by them without insisting upon the fact and the condition. He makes that action of the company with that knowledge his reply to their defense, based on that condition and its breach. . . . And so again comes up the oft-recurring and still vexed question between insurance companies and their policy holders, whether a fact thoroughly well known and comprehended by

*Whitney v. Nat. Masonic Acc. Assn.* (Minn. 1894), 59 N. W. Rep. 943; *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222, per Miller, J. This last case is criticised in *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568; 11 Vroom, 568; 29 Am. Rep. 271; *Molure v. Pennsylvania F. Ins. Co.*, 5 Rawle (Pa.), 342; 28 Am. Dec. 675; *Home Friendly Soc. v. Berry* (Ga. 1895), 21 S. E. Rep. 583; *New Jersey Mut. Life Ins. Co. v. Baker*, 94 U. S. 610, per Hunt, J. And see, also cases cited in the sections next following.

<sup>2</sup> *Lasher v. Northwestern Nat. Ins. Co.*, 55 How Pr. (N. Y.) 324; *Mowry v. Rosendale*, 74 N. Y. 360.

<sup>3</sup> *Van Scholek v. Niagara Fire Ins. Co.*, 68 N. Y. 434, per Folger, J. (Court stood four to three.)

<sup>4</sup> *Cone v. Niagara F. Ins. Co.*, 60 N. Y. 619.

both sides to the contract before it is delivered may, by force of some condition crouched unseen in the jungle of printed matter with which a modern policy is overgrown, make a defense for the company after the catastrophe and damage has happened, against which it professes to guard. It is to be confessed that the decisions in this state do not upon a cursory perusal at least seem strictly in harmony in regard to it. There are cases which hold that where an application is made a part of the policy by the terms of it, and some false assertion has been inserted in the application by the agent, when the truth has been at the same time well known to him, that the insured shall not be prejudiced thereby.<sup>5</sup> There are others where the fact fell within the condemnation of some condition in the policy; yet as the fact, as it existed, was known to the company, it was held to be estopped from the setting up the condition as against a recovery.<sup>6</sup> There are others in which there was a suit in equity seeking a reformation of the contract, and it was held that the facts showed unmistakably that the parties never meant to enter into a contract with such a condition or description in it as was set up against a recovery.<sup>7</sup> . . . It has also been held that a warranty, part of the printed matter of the policy has been dispensed with by the oral agreement of the parties made before the delivery of the policy.<sup>8</sup> On the other hand, in an action at law it has been held, where the terms of the policy are clear and unambiguous, parol proof is inadmissible to vary them, or to show that either or both parties were not aware that they were exchanging a contract such as was requested and as agreed with the facts in the situation of the policy;<sup>9</sup> and so it has been held that parol proof

<sup>5</sup> *Bowley v. The Empire Ins. Co.*, 3 Keyes (N. Y.), 557; *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; 72 Am. Dec. 526; *Ames v. New York Ins. Co.*, 14 N. Y. 253.

<sup>6</sup> *Ames v. New York Ins. Co.*, 14 N. Y. 253; *Blodwell v. N. W. Ins. Co.*, 24 N. Y. 302; *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566.

<sup>7</sup> *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283.

<sup>8</sup> *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 505.

<sup>9</sup> *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114. See also, *Rohrback v. Germania Ins. Co.*, 62 N. Y. 47; 20 Am. Rep. 451.

is not admissible to show that both parties knew that a statement in an application for a policy was not true.<sup>10</sup> . . . . There is no doubt but that, ordinarily considered, this condition in the policy was a warranty that the building did not stand upon leased land, and that the truth of that warranty became a condition precedent to any liability on the part of the defendant. Yet there is no doubt, too, that a condition in a policy may be waived by the insurer, or, as some cases put it, he be estopped from setting it up, and that such a result may be worked by parol or by act without words. . . . It would be imputing a fraudulent intent to the defendant in this case to say, or to think, that they did not mean, when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe, and such imputation can be avoided only by supposing that it had overlooked this condition, and so forgotten to express the fact as to the building in writing upon the policy; or that it waived the condition or held itself estopped from setting it up. . . . It is consistent with fair dealing and a freedom from fraudulent purpose to hold that one or the other was done; that is, that there was waiver, or is estoppel. . . . It is difficult to make all the cases upon this subject harmonize; but by the force of authority we are constrained to hold that such a condition as this may be waived by the insurer by express words to that effect, or by acts done under such circumstances as would otherwise impute a fraudulent purpose, and as will estop him from setting up the condition against the insured.”<sup>11</sup> In a Wisconsin case<sup>12</sup> the agent was fully informed of the facts, but wrote down only such answers as he deemed necessary, and the court says: “The recent cases upon this subject fully sustain the position that upon this state of facts the company is responsible for the

<sup>10</sup> *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362.

<sup>11</sup> The court distinguishes this case from *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114, and from *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362.

<sup>12</sup> *May v. Buckeye Ins. Co.*, 25 Wis. 291; 3 Am. Rep. 76.

accuracy and omissions of its agent, even without any express undertaking to be so, and that it cannot avoid liability by reason of any discrepancy between the real facts disclosed to him and his presentation of them in the papers. The tendency of modern decisions has been strongly to hold these companies to that degree of responsibility for the acts of the local agents which they scatter through the country that justice and the due protection of the people demand, without regard to private restrictions upon their authority."<sup>13</sup> It is also said in a case in the United States supreme court<sup>14</sup> that "it is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels in pais. The principle is, that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage, which if would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of that advantage, and although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood, and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us, in numerous well-considered judgments by the courts of this country. Indeed, the doctrine is so well understood and so often enforced that if in the transaction we are now considering Ball, the insurance agent who made out the application, had been in fact the underwriter of the policy, no one could doubt its applicability to the present case." In New Hampshire the legislature has enacted that applications taken by the company's agents shall not be void by reason of any error, mistake, or misrepresentation, unless it shall appear to have been intentionally and fraudulently made. The act, however,

<sup>13</sup> But see *Deweese v. Manhattan Ins. Co.* (6 Vroom), 35 N. J. L. 366, and cases cited in following sections.

<sup>14</sup> *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222, per Miller, J.



has been held not to apply to foreign corporations<sup>15</sup> and the statute of Maine so provides.<sup>16</sup> But a distinction is made by the New York court of appeals between cases of the class under consideration and those where there is a question as to the subject of insurance. The case was this: A policy was issued upon a written application and survey made by the local agent, who signed the applicant's name thereto. The negotiations related to an insurance on a mill house, but the property was described as a tenant house. The agent's acts in making the application, survey, and representations, and in signing the policy, were done without the knowledge or authority of the assured. The agent's authority was to "make surveys and take applications for insurance." In an action on the policy it was held that the contract made related to an insurance upon a tenant house, and did not apply to the mill house, and that the contract could not be made to cover another subject matter by proof that the agent, by mistake, described the wrong property. The court said: "If the contract of insurance relates to one definite and distinct subject, it cannot be turned into a contract for the insurance of another and different subject, on proof that the agent of the company, by mistake, described the wrong property in his application."<sup>17</sup>

**§ 473. Misrepresentations of Agent—Continued.**—Representations made to an insurance company by their own agent as to the situation and nature of the interest of the assured are binding upon the company, nor can it avoid the policy on the ground that representations are erroneous, where there has been no fraud, fault, or collusion on the part of the assured.<sup>18</sup>

<sup>15</sup> *Campbell v. Merchants' etc. Ins. Co.*, 37 N. H. 42; 72 Am. Dec. 324.

<sup>16</sup> Stat. Me. 1861, c. 34, sec. 2; *Caston v. Monmouth etc. Ins. Co.*, 54 Me. 170.

<sup>17</sup> *Landers v. Cooper*, 115 N. Y. 279.

<sup>18</sup> *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *Western etc. Co. v. Rector*, 85 Ky. 294; *Phoenix Ins. Co. v. Allen*, 109 Ind. 273; *Phoenix Ins. Co. v. Stark*, 120 Ind. 444; 22 N. E. Rep. 413; *Dunbar v. Phoenix etc. Co.*, 72 Wis. 492; *Menk v. Howe M. I. Co.*, 76 Cal. 50; 18 Pac. Rep. 17; *Tenemink v. Metropolitan L. Ins. Co.*, 72 Mich. 388; 40 N. W. Rep. 469.

So in case of a misdescription as to the location of personal property by the agent of the company, without the applicant's knowledge, the fact may be alleged and proved, and the company is estopped to avail itself of the error by way of defense,<sup>19</sup> and the representations made by the agent conclude the company where he fills out the policy and presents it to the applicant for his signature without acquainting him with its contents.<sup>20</sup> So where an agent corrected an old application on the same property to accord with such changes as he supposed existed in the property, and forwarded such application instead of waiting to send one which contained the applicant's answers, it was held that the company was estopped from availing itself of misrepresentations as a ground of forfeiture, and that the agent was the company's agent.<sup>21</sup> It is held that if the contract contains a stipulation that statements made to or by an agent must be inserted in the contract to bind the company, it does not aid the assured that the agent who wrote the application misrepresented the interest.<sup>22</sup> The following is substantially the classification of cases where the doctrine of estoppel applies made by the court in a New York decision, and which refers to the acts of the agent prior to the completion of the contract:

1. Misrepresentations by an agent as to some fact material to the risk, or made so by the terms of the contract contained in an application written by the agent in the name of the insured, without his authority, in which case recovery is not defeated;<sup>23</sup>
2. Where the agent is authorized to fill out the application in the name of the insured, and by mistake or inadvertence misstates the information given by the insured, the company is bound;<sup>24</sup> in both the cases the fault is that of the company's

<sup>19</sup> *Phoenix Ins. Co. v. Allen*, 109 Ind. 273; 10 N. E. Rep. 85.

<sup>20</sup> *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492; 40 N. W. Rep. 386.

<sup>21</sup> *Wilson v. Conway Mut. F. Ins. Co.*, 4 R. I. 141.

<sup>22</sup> *Shoup v. Dwelling-House F. Ins. Co.*, 51 Mo. App. 286.

<sup>23</sup> *Bennighoff v. Agricultural Ins. Co.*, 93 N. Y. 496; *Spfague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Vilas v. New York C. Ins. Co.*, 72 N. Y. 590; 28 Am. Rep. 186; *Ames v. New York Union Ins. Co.*, 14 N. Y. 253.

<sup>24</sup> *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Baker v. Home Life Ins. Co.*, 64 N. Y. 648; *Grattan v. Metropolitan Life Ins. Co.*, 92 N. Y. 274; 44 Am. Rep. 372; *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243.

agent, and the company must sustain the loss, rather than the insured; 3. Where the authorized agent of the company has knowledge of the existence of a fact or situation which would render the contract void under its conditions if not represented to the company and indorsed on the policy, here the company is estopped from availing itself on noncompliance with the condition, on the ground of fraud or injustice;<sup>25</sup> 4. Cases where the acts of the agent in filling up the application and signing the policy is not authorized by the insured, and where the subject of insurance is clearly defined in the contract, and the unauthorized act of the agent does not relate merely to some incident of the risk, but to the subject matter itself, in which case the company is not bound.<sup>26</sup>

**§ 474. Misrepresentations by Agent in the Application—Statements Made Warranties.**—There are numerous decisions which hold that where an agent of the company, without knowledge or fault of the applicant, makes false statements in the application or omits to state facts therein of which he has knowledge, the policy is not forfeited, even though it provides that the statements in the application shall be warranties; and in such cases the company may not show a breach of warranty by proof of errors material to the risk in the application or the survey.<sup>27</sup> So it is held that misstatements in the application as to the distance of buildings from the one insured made by the agent

<sup>25</sup> *Van Sholck v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Richmond v. same*, 79 N. Y. 230; *Short v. Home Ins. Co.*, 90 N. Y. 16; 43 Am. Rep. 138.

<sup>26</sup> *Landers v. Cooper*, 115 N. Y. 279, reversing supreme court.

<sup>27</sup> *Coombs v. Hannibal S. & I. Co.*, 43 Mo. 148; 97 Am. Dec. 383; *Susquehanna Mutual F. Ins. Co. v. Cusick*, 109 Pa. St. 157; *Reynolds v. Iowa N. Ins. Co.*, 80 Iowa, 563; 46 N. W. Rep. 659; *Plumb v. Catawagus etc. Ins. Co.*, 18 N. Y. 392; 72 Am. Dec. 526; *Stone v. Hawk-eye Ins. Co.*, 68 Iowa, 737; 56 Am. Rep. 870; *Dwelling-House Ins. Co. v. Brodie*, 52 Ark. 11; 11 S. W. Rep. 1016; *Continental Life Ins. Co. v. Pierce*, 39 Kan. 396; 18 Pac. Rep. 291; *Western Assur. Co. v. Stoddard*, 88 Ala. 606; 7 S. Rep. 379; *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243; 12 N. E. Rep. 609; *Lasher v. Northwestern Nat. Ins. Co.*, 55 How. Pr. (N. Y.) 318; *Mowry v. Rosendale*, 74 N. Y. 360; *Germania L. Ins. Co. v. Lunkenhelmer*, 127 Ind. 536; 26 N. E. Rep. 1082; *Klster v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553; 18 Atl. Rep. 447; 5 L. R. Annot. 646; *Texas Banking etc. Co. v. Stone*, 49 Tex. 4.

shall be deemed expressions of opinion only where the agent knew all the facts as well as the assured, even though the policy provided that the statements in the application were warranties.<sup>28</sup> But it is held that where the application provides that the statements shall be warranties, that it is the applicant's statements, that the company will not be bound by any act or statement of the agent not contained in the application, and the agent inserts false statements as to the title, value, and encumbrances, the company is not responsible therefor, and it is incumbent upon the applicant to carefully examine the paper containing the statements before signing.<sup>29</sup>

**§ 475. Where True Answers are Given but Agent Inserts Different Ones in Application.**—Where the insured at the time of making the application, gives full, true, and correct answers, relying upon the skill, honesty, and good faith of the company's agent to fill out the application correctly, and such agent makes out the application incorrectly or inserts answers different from those given or false answers, the company cannot take advantage thereof, and where the applicant is ignorant of the discrepancy or wrongful act of the agent he may recover on the policy,<sup>30</sup> even though the agent in such case

<sup>28</sup> *Thomas v. Hartford F. Ins. Co.*, 20 Mo. App. 150.

<sup>29</sup> *Holloway v. Dwelling-House Ins. Co.*, 48 Mo. App. 1; (St. L. C. A. 1892) 21 Ins. L. J. 379.

<sup>30</sup> *Home Ins. Co. v. Fallon* (Neb. 1895), 63 N. W. Rep. 860; 24 Ins. L. J. 690; *Stone v. Hawkeye Ins. Co.*, 68 Iowa, 737; 56 Am. Rep. 870; *Kausal v. Minnesota Farmers' Mut. F. Ins. Assn.*, 31 Minn. 17, per Mitchell, J.; 47 Am. Rep. 776; *Whitney v. Nat. Masonic Aid Assn.* (Minn. 1894), 59 N. W. Rep. 943; *Germania L. Ins. Co. v. Lunkenheimer*, 127 Ind. 536; 26 N. E. Rep. 1082; *Continental Ins. Co. v. Pierce*, 39 Kan. 396; 18 Pac. Rep. 291; *German Ins. Co. v. Hayden* (Col. 1895), 40 Pac. Rep. 453; *O'Brien v. Home Ben. Soc.*, 27 N. Y. St. Rep. 326; *Commercial Assur. Co. v. Elliott* (Pa.), 12 Cent. Rep. 668; 13 Atl. Rep. 980; *O'Rourke v. John Hancock M. L. Ins. Co.*, 33 N. Y. St. Rep. 522; 31 N. Y. Supp. 130; 24 Ins. L. J. 160; *Kansas Protective Union v. Gardiner*, 41 Kan. 397; 21 Pac. Rep. 233; *Lueders v. Hartford Life & Ann. Ins. Co.*, 12 Fed. Rep. 465; *Lasher v. Northwestern Nat. Ins. Co.*, 55 How. Pr. (N. Y.) 318; *Langdon v. Union M. L. Ins. Co.*, 14 Fed. Rep. 272; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Rogers v. Phoenix Ins. Co.*, 121 Ind. 570, 582; *Phoenix Ins. Co. v. Allen*, 109 Ind. 273; 276; *Flynn v. Equitable Life Ins. Co.*, 78 N. Y. 568; 34 Am. *Joyce*, Vol. L—33

has transcended his actual authority.<sup>31</sup> So it is held in Alabama that if application for insurance is made to an agent authorized to issue policies of fire insurance, to whom the applicant fully and truly stated his interest in the property, and the agent, being fully informed, drew up the application, received the premium, and turned over the policy to the applicant, it cannot be avoided on the ground that he was not the unconditional and sole owner of the property, and that his interest therein was not correctly stated in the application.<sup>32</sup>

**§ 476. Same Subject—Cases.**—Where the applicant states fully and truthfully the circumstances relating to the title and ownership of the property insured, and the agent, knowing all the facts, states the title incorrectly and issues a policy, the company cannot take advantage thereof;<sup>33</sup> and where the applicant truly states all the facts relative to keeping a watchman, and the agent writes answers which are not strictly true, the company is bound by its agent's statements.<sup>34</sup> So

Rep. 561; *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281; 36 Am. Rep. 617. That false answer without privity of applicant substituted by agent estops the company, see *Bernard v. United Life Ins. Assn.* (N. Y. 1896), 33 N. Y. Supp. 22; 66 N. Y. St. Rep. 521; *Michigan Mut. Life Ins. Co. v. Leon*, 138 Ind. 636; 37 N. E. Rep. 584; *Bowlus v. Phoenix Ins. Co.*, 133 Ind. 106; 32 N. E. Rep. 251; *Corbitt v. Metropolitan Life Ins. Co.* (N. Y. 1894), 30 N. Y. Supp. 1069; 63 N. Y. St. Rep. 809; *Kansas Farmers' F. Ins. Co. v. Saindon*, 52 Kan. 486; 35 Pac. Rep. 15; *Provident Sav. Life Assur. Soc. v. Reuthinger* (Ark. 1894), 25 S. W. Rep. 835; *Alger v. Metropolitan Life Ins. Co.*, 84 Hun (N. Y.), 271; 32 N. Y. Supp. 323; 65 N. Y. St. Rep. 481; *Bourgeois v. Mutual F. Ins. Co.*, 86 Wis. 402; 57 N. W. Rep. 38; *Mutual B. L. Ins. Co. v. Robinson*, 58 Fed. Rep. 723; 19 U. S. App. 266; 7 U. S. C. C. A. 444; *Continental Ins. Co. v. Chamberlain*, 132 U. S. 304. See *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519; *Thomas v. Commercial Assur. Co.*, 162 Mass. 29; 37 N. E. Rep. 672; *Levell v. Royal Arcanum* (N. Y. 1894), 60 N. Y. St. Rep. 579.

<sup>31</sup> *Dayton Union Ins. Co. v. McGookey*, 33 Ohio St. 555.

<sup>32</sup> *Creed v. Sun Fire Office*, 101 Ala. 522; 46 Am. St. Rep. 134.

<sup>33</sup> *Phoenix Ins. Co. v. Whiteleather*, 34 Ill. App. 60; *Dwelling-House Ins. Co. v. Dowdall*, 55 Ill. App. 622; *Williamson v. New Orleans Ins. Co.*, 84 Ala. 106; 4 S. Rep. 36; *Peck v. New London County Mut. Ins. Co.*, 22 Conn. 575; *Woodburys Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517.

<sup>34</sup> *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465.

where the agent is informed of the facts, but makes misstatements in filling out the application, the company is bound.<sup>35</sup> In another case the solicitor and agent of the company, who was in the habit of filling out applications with the knowledge of the company, propounded the questions and assumed to enter in writing in the blanks left for that purpose in the application the answers given by the applicant, who informed the agent that the house was unoccupied, but that when occupied it was occupied by the tenant as a hired man. The agent untruly represented the assured as answering that the house was occupied as a residence by a tenant, and the latter, supposing that the answers given by him to the questions were correctly entered, signed the application without noticing the misstatements. There was a conflict of evidence, but the facts were found as stated, and it was held that the misstatements could not be imputed to the assured, and the application was reformed.<sup>36</sup> So the policy cannot be avoided, on the ground that the insured was only a life tenant, when that fact was made known to the insurer's agent at the time the policy was issued, notice to him being constructive notice to the principal;<sup>37</sup> and where the applicant apprised the company's agent of all the facts concerning a mortgage on the property, and the policy required the whole amount of encumbrance on the property to be stated, the assured has a right to assume that the agent, in filling out the application, has conformed to such requirement, and has set forth the matter with such accuracy as is deemed necessary or important by the principal.<sup>38</sup> Where the assured truthfully answers as to encumbrances, and the agent states that there is no encumbrance, the insured is not precluded.<sup>39</sup> So the company cannot defend on the ground that the application failed to state the title correctly where the agent is fully informed that a deed to the insured is

<sup>35</sup> *McArthur v. Globe L. Ins. Co.*, 14 Hun (N. Y.), 348.

<sup>36</sup> *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243; 12 N. E. Rep. 609.

<sup>37</sup> *Western Assur. Co. v. Stoddard* (Ala.), 88 Ala. 606; 7 S. Rep. 379.

<sup>38</sup> *Michigan etc. Ins. Co. v. Lewis*, 30 Mich. 41; *Springfield F. & M. Ins. Co. v. Phillips* (Ky. Sup. Ct. 1894), 16 Ky. L. Rep. 352.

<sup>39</sup> *Bowlus v. Phoenix Ins. Co.*, 133 Ind. 106, 109.

only a mortgage, and latter's interest only that of a mortgagee.<sup>40</sup> The same rule obtains where the agent states that the applicant is the owner in fee, and that no other person is interested in the premises, when he has been informed to the contrary,<sup>41</sup> and the company is estopped from availing itself of the agent's misstatements in relation to the property where he is fully informed of all the facts and acquainted with the location of the property.<sup>42</sup> The company is also estopped from denying the description adopted in the policy. So where the facts in relation to the title are fully disclosed by the applicant to the company or its agents, or in case the company is otherwise cognizant of the facts, and it dispenses with any act on the part of the assured, if it erroneously determines that the assured has one kind of interest in the premises when he has another, it cannot be heard to say that they were mistaken, and by that means escape liability.<sup>43</sup> So where an applicant for an accident policy informed the agent that one of his feet had been frozen and part of the bones of such foot removed, and that the foot was sometimes numb, and was told by the agent that this was of no consequence and the latter wrote in the application that the applicant had never had any bodily or mental infirmity, it was held that the insured was not chargeable with fraud in not having read the application.<sup>44</sup> And it is held that where a clerk of the agent conducts the examination of the applicant within a few feet of the agent, who hears the answers, and it appears that clerk had been in the habit of soliciting insurance and collecting premiums, the company cannot set up false answers inserted by the clerk without the applicant's knowledge in defense to an action on the policy.<sup>45</sup> It is held, however, in Massachusetts that the fact that the property was

<sup>40</sup> *Tarbell v. Vermont Mut. Fire Ins. Co.*, 63 Vt. 53; 22 Atl. Rep. 533.

<sup>41</sup> *Crouse v. Hartford etc. Co.*, 79 Mich. 249; 44 N. W. Rep. 497.

<sup>42</sup> *Wytheville Ins. etc. Co. v. Strelz*, 87 Va. 629; 13 S. E. Rep. 77; 15 Va. L. J. 328.

<sup>43</sup> *Andes Ins. Co. v. Fish*, 71 Ill. 620.

<sup>44</sup> *Whitney v. National Masonic Acc. Assn.* (Minn. 1894), 59 N. W. Rep. 943.

<sup>45</sup> *Syndicate Ins. Co. v. Catchings* (Ala. 1894), 16 S. Rep. 461.

fully described to the agent cannot be shown to vary the written contract.<sup>46</sup>

**§ 477. Where Answers are Unintentionally Incorrect—Agent's Knowledge.**—If a local agent intrusted with printed policies of the company, signed by its officers, to be filled out and delivered as in his judgment he shall deem advisable, issues a policy and receives the premium, and the same is retained by the company, and the policy allowed to remain in force, it is bound by the policy, although there are representations made as to encumbrances which unintentionally are incorrect, but are known to be so by the agent. So it has been said that: "Perhaps in the earlier history of insurance it may have been the requirement that a written application should be made to the company at its central place of business, and that upon the information so obtained the executive officers of the company determined whether or not it was advisable to issue a policy for which application had been made. In such case the local agent had no duty to perform, except such as required the exercise of no discretion or judgment on his part. In modern times, however, this primitive method of doing business has been abandoned, and the local agent is intrusted with policies to be filled out and delivered as in his judgment he shall think advisable. The necessity of an application has, therefore, in a large measure ceased, and while the company may still disapprove of the issue of a policy, this right will be found to exist by virtue of reservations in the policy itself. Until the right of disapproval is exercised, the policy is treated by the company as binding at least as against the insured. Under these conditions it is but fair that the right to revoke the policy should continue no more than a reasonable time. In the case under consideration there was no disapproval of the policy until a lapse of nearly four months after it had been issued,

<sup>46</sup> *Thomas v. Connecticut Union Assur. Co.*, 162 Mass. 20; 37 N. E. Rep. 672; citing *Barrett v. Union Ins. Co.*, 7 Cush. (Mass.) 175; *Jenkins v. Quincy Ins. Co.*, 7 Gray (Mass.), 370; *McCluskey v. Providence-Wash. Ins. Co.*, 126 Mass. 306; *Batchelder v. Queen Ins. Co.*, 135 Mass. 449.



and then only after a total loss had been sustained. To inflexibly hold now that the representations made in the application amounted to a warranty, and that if in any respect they were untrue, the liability of the company would be avoided, irrespective of the fact that the policy was not in fact issued in reliance upon the representations made in the application, would be to sacrifice matters of substance for those of mere form. . . . There had been no proof as to the scope of the powers of the local agent. He had been furnished by his principal with a printed blank, in which were contained one hundred and forty questions to be answered by the applicant for insurance. The answers to the questions were written by the local agent of the company. In relation to some of the answers made, this agent knew of the inaccuracy. The answer to which most criticism is now directed was not recorded as given. It would be manifestly unfair to hold liable only the applicant for each of these inaccuracies. It is insisted, however, that to allow evidence as to the real facts which surround and, in our view, which should qualify the effect of the inaccurate statements in the application, would be to permit of the introduction of parol evidence to vary the terms of a written contract, and this contention is made, because by the terms of the policy the representations referred to are made a part of the policy itself. In this contention there is some plausibility, yet we think it should no more be rigidly enforced than a stipulation in an executory contract for the recovery, in case of a failure to perform, of a fixed amount carefully described as liquidated damages, as to which it is permitted to be shown that in fact not liquidated damages, but a penalty, was intended. The application signed is competent evidence to show what representations were made by the applicant, but there is no good reason for holding that this precludes all other evidence. The application cannot be made a contract, either in form or substance, even though it is therein agreed that it shall have that force. It is, at most, evidence of representations of facts preliminary to, and it may induce, the making of a contract of insurance. When these representations are written out by the agent of the insurance company, the signing of them is com-

petent evidence that such representations were made by the applicant. In view of the fact, however, that the company does not issue its policy on the faith of these representations, it is permissible to show what representations were actually made to the agent who in fact issued the policy and received the premium. His principal is bound to abide by the exercise of such discretion as has been vested in him as its agent. If, upon the policy being forwarded with the application, and even upon other evidence, the company is dissatisfied, it may disaffirm the act of its agent, return the premium, and cancel the policy. It cannot, however, return the premium and cancel or repudiate the policy when by reason of a loss of the insured property it becomes its interest so to elect to do.”<sup>47</sup>

**§ 478. False Answers by Clerk of Agent.**—Where the clerk of an agent is accustomed to solicit insurance and collect premiums, and he examines an applicant within a short distance of the agent, and without applicant's knowledge writes down false answers to the questions, the company cannot avail itself thereof as a defense.<sup>48</sup>

**§ 479. Misrepresentations — Application Signed by Agent Without Applicant's Authority.**—There is a class of cases which hold that although the representation is of some fact material to the risk, or made so by the terms of the contract, the insurance is nevertheless binding upon the company where the application was prepared by the agent in the name of the assured, but without his authority.<sup>49</sup> So if an agent fills out and signs an application without the knowledge of the applicant, the company is liable on the policy, notwithstanding provisions therein concerning misrepresentations. In this case the assured in his oral application referred to a mortgage on the

<sup>47</sup> *German American Ins. Co. v. Hart*, 43 Neb. 441; 61 N. W. Rep. 532, per Ryan, C.

<sup>48</sup> *Syndicate Ins. Co. v. Catchings* (Ala. 1894), 16 S. Rep. 46.

<sup>49</sup> *Sprague v. Holland Purchase Co.*, 69 N. Y. 128; *Ames v. New York Union Ins. Co.*, 14 N. Y. 253; *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 496; *Vilas v. New York C. Ins. Co.*, 72 N. Y. 590; 28 Am. Rep. 186. See *Landers v. Cooper*, 115 N. Y. 279, 286, per Andrews, J.

property, but the application stated that it was unencumbered.<sup>50</sup> So where the risk is erroneously described in an application purporting to be that of the person whose name is signed thereto, but which signature the company knows to be in their agent's handwriting, and which signature was unauthorized, the applicant is not bound thereby, even though the application is referred to in the policy as a part thereof.<sup>51</sup> And the insured will not be bound by a written application which fails to disclose the true title of the assured, although the policy refers thereto, where such application is not signed by the assured, and it is not shown that he authorized it to be made or ratified its execution, nor will he be bound in such case by false representations therein.<sup>52</sup> But it is held in a Maine case<sup>53</sup> that the assured was bound by a representation concerning encumbrances made by an agent in an application, although he was correctly informed of the facts, and although he signed the assured's name to the application without his knowledge, it appearing that the assured applied by letter to the company's agent for insurance, and that the policy issued referred to the application as a part thereof. The court held that by accepting the policy the assured covenanted and agreed that the statements contained in the application were full, just, and true in regard to the condition, situation, value, and risk of the property insured.

**§ 480. Where Agent Agrees to Note Fact in Application.**—The company will be estopped to avail itself of a misrepresentation contained in the application as to an encumbrance on the property where the applicant relied upon an agreement made with the agent that the fact of an encumbrance on the property should be set out in the application.<sup>54</sup>

**§ 481. Omission or Negligence of Agent in Filling out Application.**—If an agent, acting within the scope

<sup>50</sup> *Baker v. Ohio F. Ins. Co.*, 70 Mich. 199; 38 N. W. Rep. 216.

<sup>51</sup> *Landers v. Watertown F. Ins. Co.*, 19 Hun (N. Y.), 174; 86 N. Y. 414; 40 Am. Rep. 554.

<sup>52</sup> *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; 25 Am. Rep. 386.

<sup>53</sup> *Richardson v. Maine Ins. Co.*, 46 Me. 394; 74 Am. Dec. 459.

<sup>54</sup> *Copeland v. Dwelling-House Ins. Co.*, 77 Mich. 554; 43 N. W. Rep. 991.

of his authority, undertakes to fill out a blank application, and omits or neglects to state facts therein which are material to the risk, or conceals material facts of which he is fully informed, or of which he has knowledge, or if by his fault or negligence it contains statements which are false and not authorized by the instructions of the assured, such omission, negligence, or concealment is that of the agent, and not of the assured, and does not relieve the company of its obligations under the policy,<sup>55</sup> for the company cannot insist upon a condition in the policy declaring the contract to be void if certain facts or situations exist which are not represented to the company, where the agent or company is informed of, or knows at the time, all the facts relied upon to defeat the contract, but does not require a statement thereof in the application.<sup>56</sup> And where the local agent and medical examiner fails to note facts concerning the applicant's health, of which he had knowledge, the company is estopped. In this case, however, the illness was a trivial one, and did not cause the applicant's death.<sup>57</sup> So, although the policy provides for waiver of conditions only by express indorsement thereon, nevertheless the company may be estopped by the fact that assured informed the agent, when making the application, of the existence of a lien;<sup>58</sup> and where the policy provided that it should be void if

<sup>55</sup> *Ætna Life Ins. Co. v. Paul*, 10 Ill. App. 431; *State Ins. Co. v. Gray*, 44 Kan. 731; 25 Pac. Rep. 197; *Phoenix Ins. Co. v. Stark*, 120 Ind. 444, 448; *Campbell v. Merchants' etc. Ins. Co.*, 37 N. H. 35; 72 Am. Dec. 324; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Burson v. Fire Assn.*, 136 Pa. St. 267; 20 Atl. Rep. 401; 26 Week. Not. Car. 408; *Pickil v. Phoenix Ins. Co.*, 119 Ind. 291, 297; *Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302; 25 Am. Rep. 386; *Beebe v. Fire Ins. Co.*, 25 Conn. 51; 65 Am. Dec. 553; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; 4 Am. Rep. 582.

<sup>56</sup> See *Atlantic Ins. Co. v. Wright*, 22 Ill. 462; *Van Schoick v. Niagara Fire Ins. Co.*, 68 N. Y. 434; *Short v. Home Ins. Co.*, 90 N. Y. 16; 43 Am. Rep. 138.

<sup>57</sup> *Coolidge v. Charter Oak Life Ins. Co.*, 1 Mo. App. 109.

<sup>58</sup> *McGonigle v. Susquehanna Mut. F. Ins. Co.*, 168 Pa. St. 1, 14; 31 Atl. Rep. 868; citing *McFarland v. Insurance Co.*, 134 Pa. St. 590. See also *Trundle v. Providence-Wash. Ins. Co.*, 54 Mo. App. 188. So the insurer may be estopped by knowledge of the soliciting agent at the time of taking the application that the building stood on leased

the interest of the assured were not fully stated to the company, where it was other than the entire and sole ownership of the property, and the general agent, though correctly informed, omitted to state the true interest of the assured, the company was held liable on the policy on the ground of waiver of the condition, and the same was held as to a condition relating to other insurance;<sup>59</sup> nor can material concealment be pleaded by the company where the company's agent makes a personal and thorough examination of the premises.<sup>60</sup> And the same rule obtains if the agent omits to mention encumbrances in the application where he has been fully informed concerning the same and procures the applicant's signature, accepts the premium, and closes the contract.<sup>61</sup> So the company is bound where its agent, in filling up the application, omits part of the statements of the applicant as immaterial, although the omitted facts were material to the risk;<sup>62</sup> and where the soliciting agent fails to disclose facts concerning the title of which he has knowledge, the company is bound, the agent's knowledge being constructive notice to the company, and this is so even though the policy provides that the application is a warranty.<sup>63</sup> And the policy is not avoided by an omission of the company's surveyor and agent to mention a mortgage of which he was informed by the applicant, nor by his omission to mention neighboring buildings where he had personally viewed the premises, even though by the terms of the policy such omissions would avoid the same.<sup>64</sup>

**§ 482. View that not Question of Waiver or Estoppel but Whether Condition Attached.**—If local agent au-

ground: *Phoenix Ins. Co. v. Phillips* (Ky. 1894), 16 Ky. L. Rep. 122. And the same rule was held to apply in another case where no claim was made in the application as to ownership of land: *Parsons v. Knoxville F. Ins. Co.* (Mo. 1895), 31 S. W. Rep. 117.

<sup>59</sup> *Richmond v. Niagara Fire Ins. Co.*, 79 N. Y. 230; reversing 15 Hun, 248.

<sup>60</sup> *Michael v. Mut. Ins. Co.*, 10 Ia. Ann. 737.

<sup>61</sup> *German Ins. Co. v. Gray*, 43 Kan. 497; 23 Pac. Rep. 637.

<sup>62</sup> *Howard Ins. Co. v. Bruner*, 23 Pa. St. 50.

<sup>63</sup> *Reynolds v. Iowa & N. Ins. Co.*, 80 Iowa, 563; 46 N. W. Rep. 659; *Van Scholeck v. Niagara Ins. Co.*, 68 N. Y. 434.

<sup>64</sup> *Masters v. Madison Co. Mut. Ins. Co.*, 11 Barb. (N. Y.) 624.

thorized to solicit insurance, examine risks, deliver policies, and collect premiums is informed of the condition as to title of the property, the company is chargeable with the agent's knowledge, and cannot avail itself of a condition that no agent of the company should have power to waive any condition except such as by the terms of the policy were made the subject of agreement, and as to those only by indorsing the waiver upon or attaching the same to the policy. "In such cases the company is deemed to have waived the condition, or, by the delivery of the policy with the condition avoiding it in case the insured is not the sole owner, or that the property is encumbered, and accepting the premium, is held estopped from setting up the condition as a defense. It was never supposed that such a condition was intended to apply to a state of facts in regard to which the company had been fully informed when it accepted the risk. The cases on this point are numerous, and it is impossible to make any distinction in principle between the conditions considered and that involved in the case at bar.<sup>65</sup> In these cases it was held either that the company had waived the condition, or was estopped by the delivery of the policy, and the receipt of the premium, since under such circumstances it could not be supposed that it intended to deliver to the insured a policy which it knew to be void. Where the underwriter, before the inception of the contract, is informed by the owner that the property is encumbered, but still delivers the policy with the condition embodied in it, then, as it seems to me, it is not so much a question of waiver or estoppel as a question whether the condition ever attached or operated upon the facts thus disclosed. It can, of course, operate in future upon transfers or encumbrances as the facts arise, and then the question is one of waiver. But when the facts are all known before any contract is made, a condition against a state of things known by all the parties

<sup>65</sup> Citing *Van Schoick v. Niagara Falls Ins. Co.*, 68 N. Y. 434; *Whited v. Germania Ins. Co.*, 76 N. Y. 415; *Woodruff v. Imperial Ins. Co.*, 83 N. Y. 134; *Short v. Home Ins. Co.*, 90 N. Y. 16; *McNally v. Phoenix Ins. Co.*, 137 N. Y. 389; *Carpenter v. German Ins. Co.*, 135 N. Y. 298; *Cross v. National F. Ins. Co.*, 132 N. Y. 133; *Berry v. American Central Ins. Co.*, 132 N. Y. 49.

to exist cannot be deemed to be within their intention or purpose. This case cannot be taken out of the rule by any possible distinction unless it be the character and powers of the agent of the defendant"; and it was held that the agent's authority was sufficiently large to bind defendant by the communication made to him.<sup>66</sup>

**§ 483. Mistake of Agent in Filling out Application.**

Where the agent of the company is correctly informed by the applicant of all the facts, and he makes a mistake and states them incorrectly in the policy, the company is responsible therefor.<sup>67</sup> So where the agent by mistake writes the wrong name for that of the medical attendant;<sup>68</sup> or where the agent knows of the existence of a prior insurance, and states in the application that there would be none after a given date, and it appeared that he was mistaken;<sup>69</sup> or where the agent makes a miscalculation as to the age of the insured who gave to the agent the year of his birth;<sup>70</sup> or writes the husband's name by mistake for that of his wife as the assured, the agent well knowing that the property belonged to the wife.<sup>71</sup> In all such cases the error or mistake of the agent does not furnish sufficient ground for avoiding the policy by the company, and the issuance of a policy is a waiver of the inaccuracy of statements by the agent as to encumbrances;<sup>72</sup> and recovery is not defeated on a policy issued in the name of a deceased person, from whom the parties for whose benefit the policy was is-

<sup>66</sup> *Forward v. Continental Ins. Co.*, 142 N. Y. 382, 387, 388, per O'Brien, J.; 66 Hun (N. Y.), 546; 6 N. Y. St. Rep. 777; 37 N. E. Rep. 615.

<sup>67</sup> *Farmers' Ins. Co. v. Williams*, 39 Ohio St. 584; 48 Am. Rep. 474; *Poughkeepsie Sav. Bank v. Manhattan F. Ins. Co.*, 30 Hun (N. Y.), 473; *St. Paul F. & M. Ins. Co. v. Shaver*, 76 Iowa, 282; 41 N. W. Rep. 19; *Insurance Co. v. Gray*, 43 Kan. 497.

<sup>68</sup> *Langdon v. Union Mut. Life Ins. Co.*, 14 Fed. Rep. 272.

<sup>69</sup> *Emery v. Mutual etc. F. Ins. Co.*, 51 Mich. 460; 47 Am. Rep. 590.

<sup>70</sup> *Brink v. Guaranty Mut. Acc. Assn.*, 28 N. Y. 921; *McCall v. Phoenix Mut. L. Ins. Co.*, 9 W. Va. 237; 27 Am. Rep. 553.

<sup>71</sup> *Dietz v. Providence-Washington Ins. Co.*, 33 W. Va. 526; 11 S. E. Rep. 50.

<sup>72</sup> *Holmes v. Drew*, 16 Hun (N. Y.), 491. See *Sentell v. Oswego Co. Farmers' Ins. Co.*, 16 Hun (N. Y.), 516.

sued had inherited the property insured, and the agent had full knowledge of the fact, the heirs being owners of the property when application was made and at the time of the loss.<sup>73</sup> But where the agent writes the application from a memorandum of answers made by the applicant, and applicant signs it after it is read to him, this does not make the answers those of the agent. Other proof of mistake must be shown to bind the company. If the insured charges a mistake, he must prove it.<sup>74</sup> And it is held that the policy will be void where there is such a material variance in the description as amounts to a breach of warranty. The fact that an agent intended to effect an insurance on the property by whatever description should be correct will not prevent a forfeiture.<sup>75</sup>

**§ 484. Misrepresentations by Agent with Full Knowledge of Facts.**—Although there are errors material to the risk in the application sufficient to amount to a breach of warranty, the company is estopped from showing them in defense to an action on the policy, where it appears that the misrepresentations were made by the company's agent with full knowledge of the facts.<sup>76</sup> So misstatements in the application are not prejudicial where the agent of the company who made them was familiar with the property.<sup>77</sup> So the fact that the agent knew that the building stood on leased ground excuses compliance with a condition in the policy requiring such fact to be represented to the company, and expressed in the written

<sup>73</sup> *Anson v. Winneshiek Ins. Co.*, 23 Iowa, 84.

<sup>74</sup> *Alabama Gold Life Ins. Co. v. Garner*, 77 Ala. 210.

<sup>75</sup> *Tesson v. Atlantic M. Ins. Co.*, 40 Mo. 33; 93 Am. Dec. 293.

<sup>76</sup> *Coombs v. Hannibal S. & Ins. Co.*, 43 Mo. 148; 97 Am. Dec. 383; *Dwelling-House Ins. Co. v. Brodie*, 52 Ark. 11; 11 S. W. Rep. 1016; *Egglestone v. Council Bluffs Ins. Co.*, 65 Iowa, 308. An agent who is fully aware at the time of issuing the policy of all the circumstances, and assents thereto, the company will be estopped to insist upon broken conditions, although consent is required to be indorsed on the policy, and it is not: *Thacker Min. & Smelt. Co. v. American F. Ins. Co.* (Kan. C. C. A. 1895), 1 Mo. App. 535.

<sup>77</sup> *Mink v. Home Mut. Ins. Co.*, 78 Cal. 50; 14 Pac. Rep. 837. See *Crescent Ins. Co. v. Camp*, 71 Tex. 503; 9 S. W. Rep. 473.



part of the policy, otherwise the policy should be void;<sup>78</sup> nor is the insured liable for misrepresentations in the survey of the premises made by the agent of the company who was as familiar with the premises as the assured.<sup>79</sup> So where the agent who prepared the application, made the surveys and measurements contained therein, and presented the policy to the applicant for his signature, representing that he had full authority to act in the premises, and the applicant relied on the agent's statements that they were correct, and made no examination as to their correctness, it was held that the company was estopped to show a breach of warranty for material errors in such surveys and measurements.<sup>80</sup> And where the canvassing agent who prepared the application had knowledge of the existence of other insurance, the company was held estopped thereby;<sup>81</sup> and the assurer is nevertheless liable for the representations, although the rules of the company require the applicant to either make a survey himself in conformity with certain conditions or apply to the company's agent, which latter is done.<sup>82</sup> Nor can the company avail itself of a misdescription in the premises where its agent personally examines the property and fills up an application which the assured signs believing it all right,<sup>83</sup> and in such case it is not necessary that the policy be reformed before suing thereon,<sup>84</sup> and where the assurer's agent was fully aware of the fact that the applicant was deaf, and prepared an application for accident insurance, stating that he was not subject to bodily infirmity, which the applicant signed, the company was held liable.<sup>85</sup>

<sup>78</sup> *Manhattan F. Ins. Co. v. Well*, 28 Gratt. (Va.) 389; 26 A. M. Rep. 364; *Petzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 214, 216; 15 S. E. Rep. 502; *Germania Ins. Co. v. Hick*, 125 Ill. 361; 17 N. E. Rep. 792.

<sup>79</sup> *Roth v. City Ins. Co.*, 6 McLean, 324.

<sup>80</sup> *Plumb v. Cattaraugus etc. Ins. Co.*, 18 N. Y. 392; 72 Am. Dec. 526; *Beal v. Park F. Ins. Co.*, 16 Wis. 241; 82 Am. Dec. 719.

<sup>81</sup> *American Ins. Co. v. Leuttrell*, 89 Ill. 314.

<sup>82</sup> *Roth v. City Ins. Co.*, 6 McLean (C. C.), 324.

<sup>83</sup> *Susquehanna Mut. F. Ins. Co. v. Cusick*, 109 Pa. St. 157; *People's Ins. Co. v. Spencer*, 53 Pa. St. 353; 91 Am. Dec. 217.

<sup>84</sup> *State Ins. Co. v. Schreck*, 27 Neb. 527; 43 N. W. Rep. 340; 6 L. R. Annot. 524.

<sup>85</sup> *Follette v. United States Mut. Acc. Assn.*, 107 N. C. 240; 14 S. E. Rep. 923.

But in a New York case, where the application which formed part of the policy erroneously described the buildings which were within a certain distance of the premises, the court overruled a defense that the agent had full knowledge of the situation of the premises and its neighborhood, and that he drew the application and specified in it such buildings as he chose.<sup>86</sup> It is also held that where the agent of the company knows that the premises are to be used as a stable, and the use is described otherwise in the policy, no estoppel is thereby raised against the company to insist upon the warranty that the building was to be used for the purpose specified in the policy.<sup>87</sup>

**§ 485. Misrepresentations by Agent—Applicant Signs in Blank.**—If the applicant signs the application in blank, but it is drawn up by the agent of the company, and contains material errors and omissions, it does not bind the assured where he acted in good faith.<sup>88</sup> Nor is the insurer released from liability, by reason of misstatements in the application, where it appears that the applicant signed the same in blank and that the assurer's agent, upon his own motion and without authority or direction, filled out the blanks.<sup>89</sup>

**§ 486. Misrepresentations by Agent—Application Sent Unsigned to Company.**—Where the agent writes the application and is informed that the premises are mortgaged, and states in the application that there is no encumbrance, and the application is sent to the company unsigned, the misstatement is that of the company's agent, notwithstanding the policy provided that statements made by assured to the agent should be deemed made to the company "unless reduced to writing and incorporated in the application."<sup>90</sup>

<sup>86</sup> *Kennedy v. The St. Lawrence Co. Mut. Ins. Co.*, 10 Barb. (N. Y.) 285.

<sup>87</sup> *Dewees v. Manhattan Ins. Co.*, 35 N. J. L. (6 Vroom) 366. The court denies the authority of *Plumb v. Cattaraugus etc. Ins. Co.*, 18 N. Y. 392, 72 Am. Dec. 526, cited above. For misrepresentations by agent with knowledge of circumstances, see *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331.

<sup>88</sup> *Howard Ins. Co. v. Bruner*, 23 Pa. St. 50.

<sup>89</sup> *Kingston v. Aetna Ins. Co.*, 42 Iowa, 46.

<sup>90</sup> *Mowry v. Agricultural Ins. Co.*, 64 Hun (N. Y.), 137. See Con-

**§ 487. Where Agent Fills Out Application Without Inquiry or of His Own Knowledge.**—Where the company's agent, without authority from the applicant, fills out an application of his own motion and without inquiry, merely presenting it for signature, his representations, if false or incorrect, cannot conclude the assured. In such case the answer may be considered stricken from the application, or it may be treated as true.<sup>91</sup> So where the agent answers the questions from his own knowledge as to the title and situation of the property, the company cannot avail itself of the fact that the building stood on leased ground, and therefore that the contract is void under a condition in the policy requiring a special agreement in writing in such case;<sup>92</sup> and where the son of the insured was the general agent of the defendant, and knew, by reason of a personal examination of the buildings, that the premises were vacant and unoccupied, and also knew the nature of the title, and no representations were made to nor inquiries by the agent, the company is bound, notwithstanding misrepresentations by the agent as to the title and condition of the property, and this is so although the policy provides that the true title must be expressed in the policy, where the assured is not the sole and unconditional owner, otherwise it will be void.<sup>93</sup>

**§ 488. Where Applicant has no Knowledge of Facts and Agent Fills Out Application.**—Where the insurer's agent fills up the application, writing in the representations to

tinental Life Ins. Co. v. Chamberlain, 10 Sup. Ct. Rep. 87; ~~Knos~~ v. Sun Ins. Co., 67 Cal. 621; New York Life Ins. Co. v. Fletcher, 117 U. S. 519.

<sup>91</sup> Dunbar v. Phoenix Ins. Co., 72 Wis. 492, 500; 40 N. W. Rep. 386; Hingston v. Aetna Ins. Co., 42 Iowa, 46. See, also, Alexander v. Germania F. Ins. Co., 5 Thomp. & C. (N. Y.) 208; 66 N. Y. 464; 23 Am. Rep. 761. So, also, where no inquiries were made of the owner or his agent, and no statement made by him in regard to the matter: Phoenix Ins. Co. v. Phillips (Ky. 1894), 16 Ky. L. Rep. 122. See further on the general proposition. Home Ins. Co. of New York v. Gibson, 72 Miss. 58; 17 S. Rep. 13; 24 Ins. L. J. 458; West v. Norwich Ins. Co., 10 Utah, 442; 37 Pac. Rep. 685; Hart v. Niagara Ins. Co., 9 Wash. 620; 27 L. R. Annot. 86; 24 Ins. L. J. 87.

<sup>92</sup> Germania F. Ins. Co. v. Hick, 125 Ill. 361; 17 N. E. Rep. 792.

<sup>93</sup> Cross v. National Fire Ins. Co., 132 N. Y. 133; 43 St. R. 482; 30 N. E. Rep. 390. See sec. 472 herein.

suit himself, upon the insured telling him that he knows nothing of the particular subject of inquiry, and upon the refusal of the insured to make any statement about it, the insurer is estopped to deny the validity of the policy.<sup>94</sup> The company is also bound where the applicant refuses to make any statement about his age, and the agent computes it from data claimed to have been given by the assured, who signed the application without knowing its contents.<sup>95</sup>

**§ 489. Misrepresentations by Agent—Where Applicant Signs Application without Reading or Knowing Contents.**—As to the question as to how far it is obligatory upon the applicant to read the application prepared by the company's agent, the courts are divided. It can be easily understood that an applicant for insurance, with his limited knowledge of the requirements of the company in the matter of filling out the application, would naturally rely upon the experience and skill of an agent who has ostensible authority to represent the company, and who may reasonably be assumed to possess the requisite knowledge concerning such matters, and the large number of cases upon this point attest the habit of business men to sign such applications so prepared without careful examination. The cases may be divided as follows: one class being those where the assured relies in good faith upon the honesty, skill, and fair dealing of the agent as possessing the requisite knowledge as to what is necessary to be done to properly and legally fill out the application, and as possessing sufficient authority so to do; another class of decisions being those where the assured is illiterate or ignorant, and trusts entirely to the agent to make the proper representations; another class being those where the assured is induced by the representations of the agent to rely upon him, and for that reason neglects to read the application or have it read to him, and another class being where the assured neglects to read the application, through carelessness or negligence arising from a complete reliance up-

<sup>94</sup> *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222.

<sup>95</sup> *Miller v. Phoenix Mut. Life Ins. Co.*, 107 N. Y. 292; 14 N. E. Rep. 271.

on the agent's honesty and good faith. Where the agent of the company is authorized to fill out a blank application, and assumes the responsibility thereof, and the applicant, relying upon his skill and honesty, signs the application without reading or hearing it read, or knowing its contents, he is not concluded by the agent's representations, even though they may be materially false, provided, of course, that the assured has himself acted honestly in the matter.<sup>96</sup> So it is asserted in an Indiana case that if assured truthfully, in good faith, and fully, answers all required questions, and the agent prepares the application, assured is not guilty of negligence in signing it without reading.<sup>97</sup> Thus, it is said in an Illinois case that it is doubtful if the delivery of the policy is notice of its contents where the assured is unable to read and has never seen a blank policy before, the agent assuring the insured that the policy is drafted according to contract.<sup>98</sup> So, in Minnesota it is held that if an applicant for life insurance informs the agent of the facts, and is told that they are of no consequence, and the agent writes, contrary to such facts, that assured has never had any bodily or mental infirmity, the company is estopped, although the applicant fails to read the application, nor is the applicant in such case chargeable with fraud.<sup>99</sup> And it is held that the fact that the assured could have read the application will not aid the company;<sup>100</sup> and on trial of such a case the assured may testify that he did not read the application, thus showing a reliance

<sup>96</sup> *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646; *Senimenk v. Metropolitan L. Ins. Co.*, 72 Mich. 368; 40 N. W. Rep. 469; *Dahiberg v. St. Louis Mut. etc. Ins. Co.*, 6 Mo. App. 121; *Phoenix Ins. Co. v. Coomes*, (Ky. Sup. Ct. 1891), 13 Ky. L. Rep. 238; *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492; 40 N. W. Rep. 386.

<sup>97</sup> *Germania etc. Ins. Co. v. Lunkenheimer*, 127 Ind. 536, 542.

<sup>98</sup> *Continental Ins. Co. v. Ruckman*, 127 Ill. 364. The policy contained notice that no agent had the right to waive, modify, or strike out any printed conditions, and the policy delivered was to contain a condition as promised by the agent that the premises might remain unoccupied for a specified time.

<sup>99</sup> *Whitney v. National Masonic Acc. Assn.*, 57 Minn. 472; 59 N. W. Rep. 943, and cases cited by respondent's counsel.

<sup>100</sup> *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622; 52 Am. Rep. 227.

on the agent's acts.<sup>101</sup> And the rule applies to a case of overvaluation by the agent of the company in the written application, where the insured signs the application without reading it, and without knowing the value inserted therein, and where he acts in good faith, even though the application is made a part of the policy and such statements warranties.<sup>102</sup> But it is expressly declared in a Connecticut case<sup>103</sup> that signing an application for a life risk without reading or having it read is inexcusable negligence on the part of the applicant; that when he signed it he was bound to know what he signed; that the law requires the applicant to "use reasonable diligence to see that the answers are correctly given. It is for his interest to do so, and the insurer has a right to presume that he will do it. He has it in his power to prevent this species of fraud, and the insurer has not." It has also been held in other cases inexcusable negligence not to read the application.<sup>104</sup> Thus, it is decided in Colorado that if one can read, and signs without reading an application filled out by the soliciting agent, he assumes the risk of falsity or misstatements of fact written out by the agent.<sup>105</sup> So in the absence of proof to the contrary it will be presumed that the applicant knew and indorsed the contents of the application when he signed it.<sup>106</sup>

**§ 490. Misrepresentations by Agent—Where Applicant is Illiterate, etc.**—Where the applicant has no accurate knowledge as to the facts, and the agent who assumes to act for the company in filling out the application has full

<sup>101</sup> *Mighan v. Hartford Fire Ins. Co.*, 24 Hun (N. Y.), 141, 58 (case of representations as to title).

<sup>102</sup> *Wheaton v. North British & Mercantile Ins. Co.*, 76 Cal. 415; 18 Pac. Rep. 758. See, also, *Cumberland Valley Mut. Prot. Co. v. Schell*, 29 Pa. St. 31.

<sup>103</sup> *Ryan v. World Mut. L. Ins. Co.*, 41 Conn. 168; 19 Am. Rep. 490.

<sup>104</sup> See *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Walker v. State Ins. Co.*, 46 Kan. 312; 28 Pac. Rep. 718; *Outhbertson v. North Carolina Home Ins. Co.*, 96 N. C. 480; 2 S. E. Rep. 258; *Briggs v. Fireman's Ins. Co.*, 65 Mich. 52; *Chatillon v. Canadian etc. Ins. Co.*, 27 U. C. C. P. 450; *Susquehanna M. F. Ins. Co. v. Swank*, 102 Pa. St. 17.

<sup>105</sup> *Sun Fire Office v. Wich* (Col. 1895), 39 Pac. Rep. 587.

<sup>106</sup> *Hartford Fire Ins. Co. v. Gray*, 80 Ill. 28.

knowledge of all the facts, and writes out the answers from such knowledge, and the applicant, who is an illiterate man, relies upon the agent and signs the application, the company is bound, and the statements will be held to be representations and not warranties.<sup>107</sup> So where a woman not versed in legal terms states the facts as to her title to the company's agent, and he writes in the application that she has a fee simple, when she has not, and also puts other statements therein knowing them to be false, the assured is not concluded thereby, but may recover;<sup>108</sup> and the company will be obligated where its agent willfully writes false answers in the application knowing that the assured is unable to read.<sup>109</sup> So where the agent of the insurer in filling out the application knew the assured had only a part interest in the property, but stated otherwise, and the assured was unable to read or write, but trusted to the agent, and she herself acted honestly in the matter, the company cannot evade its liability on the policy, even though it provides that an interest other than a fee simple must be truly represented,<sup>110</sup> and the company is estopped from availing itself of the acts of its agent in taking advantage of the insurer's inability to read and in misleading him as to the amount of additional insurance allowed, and as to making proofs of loss.<sup>111</sup> And where the applicant was a German, unfamiliar with business or the English language and referred the agent to a tenant, who signed the application, and the policy contained no statement of the tenant's interest, the insurer was held entitled to recover to the extent of his interest.<sup>112</sup>

**§ 491. Fraud of Agent in Preparing Application.**—Where the assured acts honestly, but is misled by the acts and conduct of the agent of the company into believing that his

<sup>107</sup> *O'Rourke v. John Hancock M. L. Ins. Co.*, 63 N. Y. St. Rep. 522; 31 N. Y. Supp. 130; 24 Ins. L. J. 160; *Phoenix Ins. Co. v. Golden*, 121 Ind. 524; 23 N. E. Rep. 503; *O'Brien v. Home Benefit Soc.*, 117 N. Y. 310.

<sup>108</sup> *The Rockford Ins. Co. v. Nelson*, 75 Ill. 548.

<sup>109</sup> *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170.

<sup>110</sup> *Hartford F. Ins. Co. v. Haas*, 87 Ky. 531; 9 S. W. Rep. 720.

<sup>111</sup> *Rivara v. Queen's Ins. Co.*, 62 Miss. 720.

<sup>112</sup> *Diebold v. Phoenix Ins. Co. of Brooklyn*, 33 Fed. Rep. 807.

answers are taken down truly and as given, and by fault of the agent he does not learn to the contrary, the company cannot escape liability by reason of answers to material questions being falsely and fraudulently put down by the agent in the application as those given by the applicant.<sup>113</sup> And in such case the assured is justified in accepting in good faith and without examination the act of the company's agent, who in filling out such application is acting within the apparent scope of his authority.<sup>114</sup> And where such agent, acting for a life company, falsely stated the applicant's age, forged a medical certificate which was a part of the application, and materially changed the policy before delivering it to the insured, which frauds were perpetrated without the knowledge of either the assured or the company, it was held that the company was nevertheless liable on the policy.<sup>115</sup> So the company is bound by the acts of its agent in changing an application after it is signed by inserting therein an additional piece of property, and also changing answers relating to the title and to encumbrances on and concerning the value of the property, where the assured and the principal were both ignorant of such fraudulent acts of the agent. The court held, however, that the failure of the assured after a reasonable time to object, bound him to the terms of the policy,<sup>116</sup> and so the company is bound where the assurer's agent substitutes another and different application for that made by the assured.<sup>117</sup> In opposition to these decisions is a Connecticut case.<sup>118</sup> There the agent of a life insurance company with authority to receive and forward applications, countersign and deliver policies, and collect premiums, fraudulently put down false answers to material questions in the ap-

<sup>113</sup> *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 507; 96 Am. Dec. 65; *Swan v. Watertown F. Ins. Co.*, 96 Pa. St. 37; *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170.

<sup>114</sup> *Keister v. Lebanon Mut. Ins. Co. (Pa.)*, 18 Atl. Rep. 447; 5 L. R. Annot. 646.

<sup>115</sup> *McArthur v. Home Life Assn.*, 73 Iowa, 336; 35 N. W. Rep. 430.

<sup>116</sup> *Swan v. Watertown Fire Ins. Co.*, 96 Pa. St. 37 (two judges dissenting as to the effect of the retention of the policy.)

<sup>117</sup> *Massachusetts Life Ins. Co. v. Eshelman*, 30 Ohio St. 647.

<sup>118</sup> *Ryan v. World Mut. Life Ins. Co.*, 41 Conn. 168; 19 Am. Rep. 490. See, also, *N. Y. Life Ins. Co. v. Fletcher*, 117 U. S. 519.



plication, which were not the answers given by the applicant and the court declared the agent's acts a gross violation of his duty in fraud of the insurer.<sup>118a</sup> The opinion, however, distinguishes between the powers of agents of fire and life companies saying that in the former case, where the agent has power to fill up and issue the policies, "the acts and knowledge of the agent are the acts and knowledge of the corporation, and there is a manifest propriety in holding the corporation liable accordingly."<sup>118b</sup> A distinction is also made

<sup>118a</sup> The court says: "In this case we are asked to . . . clothe the agent with an authority not given him in fact, and to hold the principal responsible for an act which could not by any possibility have been contemplated as being within the scope of the agency. . . . It cannot be supposed that these defendants intended to clothe this agent with authority to perpetrate a fraud upon themselves. That he deliberately intended to defraud them is manifest. . . . Prompted by some motive he sought to obtain a policy by means of false answers. His duty required him not only to write the answers truly as given by the applicant, but also to communicate to his principal any other fact material to the risk which might have come to his knowledge from any other source. His conduct in this case was a gross violation of duty in fraud of his principal and in the interest of the other party. To hold the principal responsible for his acts and assist in the consummation of the fraud would be monstrous injustice. Where an agent is apparently acting for his principal, but is really acting for himself or third persons and against his principal, there is no agency in respect to that transaction, at least as between the agent himself or the person for whom he is really acting and the principal. . . . We are constrained, therefore, to hold that a limited agency in a case of life insurance will not be extended by operation of law to an act done by the agent in fraud of his principal and for the benefit of the insured, especially where it is in the power of the insured by the use of reasonable diligence to defeat the fraudulent intent."

<sup>118b</sup> The force of the argument and conclusion of the court is also somewhat modified by the declaration that "the court very properly instructed the jury that 'an untrue or fraudulent statement or denial made by the applicant of a fact material to the risk to induce the issuance of a policy will prevent the policy from taking effect as a valid contract, unless the insurer has in some way waived or estopped himself from relying upon such misstatement to avoid the policy. This waiver, to be effectual, must be made by an officer of the company authorized to make it. If there has been no evidence of any waiver, except by a medical examiner of the company or by a local agent, there must be additional proof of specific authority given them, or the company will not be bound.'" This instruction

which is somewhat refined between the case before the court and that where the representation in the application made by the company's agent was not fraudulent, but still "not strictly true," in which case the company was declared bound.<sup>119</sup> The court also distinguishes those cases sustained by the courts of that state, in prior decisions which hold that where the applicant stated fully and truthfully the circumstances relating to the title to the property insured and the agent, knowing all the facts, "but for the sake of convenience, stated the title incorrectly" and issued a policy, the company could not take advantage of it, saying: "The court regarded the transaction as equivalent to an agreement that for the purpose of the insurance the title should be considered as stated by the agent."<sup>120</sup> Another fact upon which the court placed some stress was that the negligence of the plaintiff in not reading the application aided in the perpetration of the fraud upon the company and the situation of the applicant as to health was such that no company would have probably accepted him, and that the plaintiff would therefore be injured only to the extent of the premiums paid. The case, therefore, can hardly be said to establish a rule of law applicable to even all life risks. The most that can be claimed for

must necessarily have had reference to the special facts of the case and in this connection the court thereafter says: "The case before us is a case of life insurance. The power of the agent was in fact limited. He had no power to issue policies. The terms of his agency conveyed no authority to waive conditions or forfeitures, or to agree to false and fraudulent answers to any of the interrogatories, or to make any other contract to bind the company. Presumptively, the insured and the plaintiff knew all this before paying the premium, for the printed policy, which was in their hands for several days, contained at the bottom this note: 'The president and secretary of the company are alone authorized to make, alter, or discharge contracts or to waive forfeitures.' The jury then were correctly told that 'there must be additional proof of special authority given them' (the local agent and the medical examiner) 'or the company will not be bound.'"

<sup>119</sup> Referring to *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465 and also to *Beebe v. Hartford etc. Ins. Co.*, 25 Conn. 51; *Hough v. City Fire Ins. Co.*, 29 Conn. 10; 76 Am. Dec. 581.

<sup>120</sup> Referring to *Peck v. New London etc. Ins. Co.*, 22 Conn. 575; *Woodbury Sav. Bank v. Charter Oak Ins. Co.*, 81 Conn. 517.

it is, that it determines that the fraudulent answers in an application made by an agent with limited powers, of which the applicant had constructive notice, precludes a recovery on a policy on a life which no reliable company would have insured had the truth been stated, and the failure to recover on which would, therefore, cause the plaintiff no pecuniary loss, except possibly that of the premium paid and not that if he were innocent. In the case of *Fletcher v. New York Life Insurance Company*<sup>121</sup> the agent's authority was limited, and notice of such limitation was embodied in the application. The agent represented that it was only necessary to answer certain questions merely as a form. The agent wrote in false statements concerning the applicant's physical condition and the latter signed the application without reading the same. The court says: "The instruction given to the jury in the case before us is, in effect, that the insured was bound by his application if it was not avoided by fraud, and that it was so avoided by reason of the false statements contained in it, and that therefore the plaintiff, as his representative, could recover. But if the application was avoided it would seem to be a necessary consequence that the policy itself was also voided and his right limited to recovering the premiums paid. But such was not the conclusion of the court. It directed the jury that if the application was avoided for fraud he could recover. It does not seem to have occurred to the court that had the answers been truthfully reported, and that the fact of the assured having had diabetes within a recent period been thus disclosed, the insurance would in all probability have been refused. If the policy can stand with the application avoided it must stand upon parol statements not communicated to the company. This, of course, cannot be seriously maintained in the face of its notice that only statements in writing forwarded to its officers would be considered. A curious result is the outcome of the instruction. If the agents committed no fraud, the plaintiff cannot recover, for the answers reputed are not true; but if they did commit the imputed fraud, he may recover, although upon the an-

<sup>121</sup> 117 U. S. 531, reversing 14 Fed. Rep. 846; 3 McCrary, 603; 11 Fed. Rep. 377; 12 Fed. Rep. 557; 13 Fed. Rep. 526.

swers actually given, if truly reported, no policy would have issued. Such anomalous conclusions cannot be maintained"; and it was held that the policy was avoided. There is another class of cases which are somewhat analogous to the Connecticut case above considered, in that they are based upon constructive notice to the assured by reason of a provision in the policy that the agent cannot bind the company by any promise, representation, or information not contained in the application, the force of which condition is held so far binding upon the assured as to preclude him from proving by parol evidence that the answers were false and not those given, and that the applicant relied upon the agent to insert the true answers as given, and did not know the contents of the application.<sup>122</sup> It would seem, however, that where an insurance company has put it into the power of an agent to represent it in procuring applications, and the agent acting within the scope of his ostensible authority commits a fraud upon his principal, by inserting fraudulent answers in the application, of which act the assured is ignorant, he himself having acted in good faith and having no knowledge of limitations on the agent's powers, that the company cannot avail itself of its agent's fraudulent acts to avoid a contract to the prejudice of the insured or of his beneficiary, or other innocent party to whom the loss may be payable.<sup>123</sup>

**§ 492. Agent's Knowledge of Falsity or Incorrectness of Applicant's Statements.**—In considering this question regard should be had to the fact whether the applicant's statements are willfully false or merely untrue, and made by him without fraudulent intent. Where they are willfully false, and the agent has knowledge of their falsity, there would

<sup>122</sup> *Fitzmaurice v. Mut. Life Ins. Co.*, 84 Tex. 61; 19 L. W. Rep. 301; *Enos v. Sun Ins. Co.*, 67 Cal. 621. See *Stensgaard v. St. Paul Real Estate Title Co.*, 50 Minn. 429; 52 N. W. Rep. 910. See, also, in this connection, *Continental L. Ins. Co. v. Chamberlain*, 10 U. S. Sup. Ct. Rep. 87.

<sup>123</sup> See *Senimenk v. Metropolitan L. Ins. Co.*, 72 Mich. 388; 40 N. W. Rep. 469; *Mowry v. Rosendale*, 74 N. Y. 363; *Schwarzbach v. Ohio Valley Prot. Union*, 25 W. Va. 622; *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170; *Plumb v. Cattaraugus etc. Ins. Co.*, 18 N. Y. 392; 72 Am. Dec. 526; *Eggleston v. Council Bluffs etc. Ins. Co.*, 65 Iowa, 308.

certainly be a close approach to the border line of collusion, even though there were no actual collusion. Some cases have gone to the extent of holding that even though an applicant makes an untrue and fraudulent statement of a material fact, that a recovery could nevertheless be had against the company where its agent knew the truth at the time, and the company received the application and premium and issued the policy, provided there was no actual collusion.<sup>124</sup> So in a Washington case it is held that if a broker who acts for and is agent of the insurer, in dealing with the applicant, fails to disclose a fact material to the risk which has been truthfully stated in the original application, the knowledge of the fact will be imputed to the insurer, and the latter cannot avoid the policy on the ground that the insured has violated its conditions.<sup>125</sup> Other cases hold that the policy is not avoided where the soliciting agent inserts misrepresentations in the policy and the applicant has knowledge thereof, but, acting without any fraudulent intent, and induced by the representations of the agent that it will make no difference, he permits them to stand as written.<sup>126</sup> So it is held in Missouri<sup>127</sup> that evidence is admissible that before the policy was made out and delivered, and the premium paid, the applicant informed the agent that he was only a part owner of the insured property, and that the agent said it would make no difference, or used words of like effect. In another case<sup>128</sup> where it appeared that the agent erroneously stated in the application that there was no encumbrance, and he was notified of the mistake by the assured before he received the policy, and the company was also informed thereof, the court upheld the right of the assured to recover. Other cases, however, hold that where the applicant makes a false state-

<sup>124</sup> *Guardian etc. Life Ins. Co. v. Hogan*, 80 Ill. 35; 22 Am. Rep. 180; *Miller v. Mut. etc. Ins. Co.*, 31 Iowa, 216; 7 Am. Rep. 122; *Etna etc. Ins. Co. v. Olmstead*, 21 Mich. 246; 4 Am. Rep. 483; *Miller v. Hartford F. Ins. Co.*, 70 Iowa, 704; *Witherell v. Marine Ins. Co.*, 49 Me. 200.

<sup>125</sup> *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524; 34 Am. St. Rep. 877.

<sup>126</sup> *Reynolds v. Iowa & N. Ins. Co.*, 80 Iowa, 563; 46 N. W. Rep. 659.

<sup>127</sup> *Franklin v. Atlantic etc. Ins. Co.*, 42 Mo. 456.

<sup>128</sup> *Anson v. Winneshiek Ins. Co.*, 23 Iowa, 84.

ment to the agent, and the latter has knowledge of the falsity, the company may nevertheless avoid the contract. Thus, where the applicant untruly states the purpose for which a building is used, the agent's knowledge as to its use constitutes no defense to false statements in proofs of loss.<sup>129</sup> So the agent's knowledge that representations in the application are false does not conclude the company where such statements are made warranties.<sup>130</sup> And the same rule obtains where the applicant states that he has applied to another insurance company, and has not been rejected, which is false, for in such case the company may set up the breach of warranty notwithstanding its agent's knowledge of the fact that the statement was untrue;<sup>131</sup> nor is evidence admissible that the soliciting agent knew at the time of the falsity of representations as to health made by the insured.<sup>132</sup>

**§ 493. Where Applicant is Assured by Agent that Application is Correct.**—The assured is not concluded by a warranty or representation where the company's agent has knowledge of the facts, but assures the applicant that the form in which the facts are stated in the application is correct. Thus where a husband owned property located on land belonging to his wife, and the agent, with full knowledge thereof, filled out the application for them as joint owners, assuring them that it was correct, in reliance of which representation of the agent they signed the application, it was held that they might sue jointly on the policy.<sup>133</sup> So the company is bound, where the application contains representations which are ambiguously expressed by its agent, when he assures the applicant that it correctly embodies his own statements.<sup>134</sup> And

<sup>129</sup> *Hansen v. American Ins. Co.*, 57 Iowa, 541.

<sup>130</sup> *Sullivan v. Metropolitan L. Ins. Co.*, 36 N. Y. St. Rep. 38; 12 N. Y. Supp. 923.

<sup>131</sup> *Clemens v. Supreme Assembly of the R. S. of G. F.*, 131 N. Y. 485; 43 N. Y. St. Rep. 571; 30 N. E. Rep. 496.

<sup>132</sup> *Galbraith v. Arlington Ins. Co.*, 12 Bush (Ky.), 29.

<sup>133</sup> *Kausal v. Minnesota Farmers' etc. Assn.*, 31 Minn. 17; 47 Am. Rep. 77.

<sup>134</sup> *Ætna etc. Ins. Co. v. Olmstead*, 21 Mich. 246; 4 Am. Rep. 483; See *May v. Buckeye etc. Ins. Co.*, 25 Wis. 291; 3 Am. Rep. 76.

where there was a misdescription of the distance of the adjacent buildings from the premises insured, and the agent of the company had made the measurements and obtained the signature of the insured on representing that the application was all right, the court declared that evidence of such fact was not admissible to alter or contradict the written contract, but was admissible as an estoppel in pais;<sup>135</sup> and such contract obligation may be sustained against the company in such case on the ground either of waiver or estoppel.<sup>136</sup>

**§ 494. Misrepresentations by Agent—Insured may Rescind.**—If the company's agent in filling out the application makes misstatements or misrepresentations therein without the knowledge of the assured which are material and which would have avoided the policy had they been made by the latter, he may rescind the contract, although the company would be bound.<sup>137</sup>

**§ 495. Broker's Misrepresentations—Application.**—The question whether the assured is precluded in case of incorrect, untrue, or false representations made by the broker in filling out the application has been held to depend upon the fact whether the broker was the agent of the applicant or the company, it having been declared that the applicant was concluded where the broker was his agent and otherwise where he was the company's agent, and that the applicant was bound where he made false statements to the broker.<sup>138</sup> And in a Vermont case<sup>139</sup> it was decided that the company could not avoid liability where the broker, who had an office with the company's agent, was, upon the return to the agent of the application, requested to go out and obtain information as to the ownership of the property, and he, although being correctly

<sup>135</sup> *Plumb v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 382; 72 Am. Dec. 526; denied in *Dewees v. Manhattan Ins. Co.*, 35 N. J. L. (6 Vroom) 306, 374.

<sup>136</sup> *Lasher v. Northwestern Nat. Ins. Co.*, 55 How. Pr. (N. Y.) 324.

<sup>137</sup> *Michigan Mut. Life Ins. Co. v. Reed*, 84 Mich. 524; 47 N. W. Rep. 1106.

<sup>138</sup> *Commercial etc. Co. v. Elliott* (Pa. 1888), 13 Atl. Rep. 970.

<sup>139</sup> *Mullen v. Vermont Mut. F. Ins. Co.*, 58 Vt. 113.

informed by the assured, knowingly made false statements concerning the matter.<sup>140</sup> But where an insurance broker, without the knowledge or authority of the owner, stated that the building was used for one purpose when in fact it was used for another, which was a more hazardous risk, it was held that there was no contract, as the minds of the parties never met on the subject matter.<sup>141</sup> And where a person at the time the application was made was acting as an insurance broker, and had not prior thereto been acting for the company, a notice to him that the property was mortgaged, or was situated on leased ground, is not notice to the company.<sup>142</sup> So in a federal case it is held that the broker is the agent of the assured to procure the policy, and that concealment by him of material facts avoids the policy.<sup>143</sup> In connection with this subject, however, the limited powers of the broker, when acting as the company's agent, should not be overlooked.

**§ 496. Oral Application—Agent's Knowledge.**—It may be stated as a general rule that, if there is no written application and the company issue a policy without one, or without any written request or without any representation, oral or written, the policy may be assumed to have been written upon the knowledge of the company or its agent, and in such case the company cannot after a loss set up that the interest or title of the assured is other than that evidenced by the policy. And it may be further stated that in such case the knowledge of the agent through whom the insurance is effected defeats the company's right to avail itself of a fact contrary to that stated in the policy and known at the time the insurance was effected.<sup>144</sup> In a Pennsylvania case<sup>145</sup> there was a condition in the policy

<sup>140</sup> See *May v. Western Assur. Co.*, 27 Fed. Rep. 260.

<sup>141</sup> *Goddard v. Monitor Mut. F. Ins. Co.*, 108 Mass. 56; 11 Am. Rep. 307.

<sup>142</sup> *East Texas F. Ins. Co. v. Brown*, 82 Tex. 631; 18 S. W. Rep. 713.

<sup>143</sup> *Hamblett v. City Ins. Co.*, 36 Fed. Rep. 118. See section 414 upon the point whether broker is agent of insured or assured.

<sup>144</sup> *Kenyon v. Knights Templars & M. Mut. Aid Assn.* 122 N. Y. 247, 257; 33 N. Y. St. St. Rep. 467; 25 N. E. Rep. 299.

<sup>145</sup> *Philadelphia Tool Co. v. British American Assur. Co.*, 132 Pa. St. 236; 19 Atl. Rep. 77.



that it should be void if the assured was not the sole and unconditional owner of the property, or if the building stood on ground not owned in fee simple by the assured, or if the interest of the assured was not truly stated in the policy. The policy was written without any application or written request describing the interest of the assured in the building. It did not appear that any actual representation, either oral or written, was made by the assured. The defense of the company was that the only title of the assured was that of lessee, and the policy was therefore void, and the court held that the policy was written on facts within the knowledge of the insurer, and was intended to and did cover such interest as the assured had.<sup>146</sup> In another case a policy was issued upon an oral application made to the company's agent by the assured; the company set up the defense that the policy was void, because of misrepresentations as to title and encumbrances, and because the true state of the title was not indorsed on the policy in accordance with certain provisions therein. The agent was fully informed, and was cognizant of the true state of the title at the time the application was made, and it was decided that the company was bound.<sup>147</sup> And the court declared "we do not think that it would carry out the intention of the parties, or be a fair

<sup>146</sup> See, also, *Dwelling-House Ins. Co. v. Hoffman*, 125 Pa. St. 626; 18 Atl. Rep. 397.

<sup>147</sup> *Hoose v. Prescott Ins. Co.*, 84 Mich. 309; 32 Cent. L. J. 226. The court said: "We must look at the situation of the parties, the condition of the thing insured, and what was said or done at the time the insurance was effected, in order to arrive at the intention of the parties, which, as before stated, must control in the construction of the warranties contained in the instrument. If the representations are in writing, that is the evidence of what they are. If no application is made in writing, and no statements contained in any written application for insurance as to the risk and the subject matter of it, then oral proof of such facts may be introduced. . . . Now, the first important provision contained in the warranty is, that any application or statement connected with procuring this insurance is true, and shall be a part of the policy. This provision makes the oral application and statement made at the time the policy was applied for to the agent of the defendant a part of the contract, and the finding of the jury in the case is conclusive upon the defendant that its agent was informed of the condition of the title to the real estate on which the building mentioned in the said policy stood and of the mortgage thereon. . . . The further provision

and just construction of this instrument, to hold that when it was issued and accepted by the assured, and the premium

is not a warranty, namely: 'This company shall not be bound under this policy by any act of or statement made to or by any agent or other person which is not contained in this policy or in any written paper above mentioned.' Nor under the circumstances under which this policy was made and delivered, can it have any binding effect at all upon the assured, except as to statements and acts of agents and others after the delivery and acceptance of the policy; and this, for the reason that the company is bound by verbal statements made to its agent, upon which it assures insurance and receives the pay therefor. And it cannot, in the instrument by which it agrees to insure, repudiate the authority of the agent or repudiate responsibility for his acts as such." The court then refers to the conditions relating to sole and unconditional ownership, and to the title and interest of the assured and to change in title, interest, etc., and the indorsement thereof on the policy, and continues: "In construing this portion of the policy, the whole must be taken together. Now, the object sought to be accomplished by the person applying for insurance was to obtain indemnity against loss by fire of her interest in the building. If the insurance company which made out this policy upon the verbal application to its agent had desired to know what interest it was insuring, it should have stated it in that part of the policy pertaining to the risk. It was the intention of these parties to issue a valid and binding contract of insurance, valid and binding from the time of acceptance of the same by the assured, not that after it had been accepted by the assured then the assured should apply to the company and obtain its consent in writing indorsed on the policy, stating that the assured was the sole and unconditional owner of the property, or stating that the building intended to be insured stood on ground not owned in fee simple by the assured, or stating by indorsement on the policy the interest which the assured had in the property covered by the insurance, and yet the language of this part of the policy is, that the entire policy, and every part thereof, shall become void, that is, void in the future, unless such consent in writing is indorsed by the company thereon. To give any reasonable force and effect to this clause of the policy, it can only be held to apply to such changes as arise, after the policy has been delivered and accepted, in the ownership of the property, or if a building stood upon leased ground, the ownership of the building, and it does not apply to an existing state or condition of the property at the time the policy was issued. It looks to the future for protection of the insurer, and not to the present, only in so far as the preceding portion of the policy is violated by a misstatement or concealment of any fact material to the risk. Construing this portion of the policy with the testimony in the case, and with the fact that the company issued the policy to Mrs. Hoose, without stating in the policy what her interest was, but insuring the build-

paid, it was void from that moment, because it did not contain the indorsements required."<sup>148</sup>

**§ 497. Information Obtained from Others by Agent—Application.**—Where an agent is furnished with a blank application which he is authorized to fill out by the company, and he relies in so doing upon information obtained from others, rather than upon that from the applicant, and a policy is issued thereon, the company cannot avoid liability on such policy, but is bound by its agent's acts, even where the applicant signs such application, provided he is ignorant of the false statements therein.<sup>149</sup>

**§ 498. Where Agent Writes Down such Answers as He Deems Material—Application.**—If the agent of the company be fully informed as to the facts, and the policy be issued on a written application signed by the assured, wherein is set forth, in answer to printed interrogatories, only such portions of the answers given by the assured as the agent deems material, he having been fully informed as to the facts, the company will be liable upon the policy, notwithstanding the application sets forth falsely the existence of certain necessary conditions concerning the care of the property insured. This was

ing against loss by fire to an amount not exceeding the interest of the assured in the property, we think that it must be held that the defendant understood the condition of the title, and intended to insure whatever interest Mrs. Hoose had which was insurable, not exceeding the amount named in the policy."

<sup>148</sup> See, also, *Gilman v. Dwelling-House Ins. Co.*, 81 Me. 488; 17 Atl. Rep. 544; *Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co.* (U. S. C. C.), 19 Ins. L. J. 372; *Commonwealth v. Hide & Leather Ins. Co.*, 112 Mass. 136; 17 Am. Rep. 72; *Blake v. Exchange Mut. Ins. Co.*, 12 Gray (Mass.), 265; *Sibley v. Prescott Ins. Co.*, 57 Mich. 143; *Western Assur. Co. v. Mason*, 5 Bradw. (Ill.) 141; *Washington Mills etc. Co. v. W. & B. Mut. F. Ins. Co.*, 135 Mass. 503; *Castner v. Farmers' Mut. F. Ins. Co.*, 46 Mich. 15; *Trade Ins. Co. v. Barracloff*, 45 N. J. L. (16 Vroom) 543; 46 Am. Rep. 792; *Agricultural Ins. Co. v. Yates*, 10 Ky. L. R. 984; *Guest v. New Hampshire F. Ins. Co.*, 66 Mich. 98; 31 N. W. Rep. 31; *O'Brien v. Ohio Ins. Co.*, 52 Mich. 131; "The cases of *Waller v. Northern Assur. Co.*, 10 Fed. Rep. 232, and *Ross v. Citizens' Ins. Co.*, 3 Pugs. & B. (N. B.) 126, hold contrary to this rule, but they are overwhelmed by the weight of authority in favor of the rule": *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123.

<sup>149</sup> *Donnelly v. Cedar Rapids Ins. Co.*, 70 Iowa, 693.

so held where the company sought to evade its liability on the ground that certain conditions regarding a watchman and a pump were not complied with where the insurance was upon the plaintiff's factory.<sup>150</sup>

**§ 499. Where Agent Dictates or Advises the Answers—Application.**—Where an agent, acting for the company in filling out the application, receives correct answers to the questions asked the applicant by him, and dictates or suggests the answers, and such answers are incorrect, the insured is not concluded thereby, provided that he himself acts in good faith.<sup>151</sup> And the same rule obtains where, by the special advice of such agent, certain answers alleged by him to be immaterial are omitted, and the assured is induced to sign the application by reason of such agent's representations that the answers are properly and sufficiently set out therein, even though the certificate issued thereon provides that the application is a part of the contract, and the statements therein warranties, and that the certificate shall be void if the applicant omits to state all the facts relating to his health or which may materially affect the risk;<sup>152</sup> and where the agent told the applicant that it was unnecessary to state that he had had a sunstroke, the company is estopped from setting up that such concealment was a breach of the condition of the policy.<sup>153</sup> So the company is bound where its agent is fully informed as to the existence of certain mortgages on the property, and the answer that there were no encumbrances is written in the application by the advice and consent of such agent, on the ground that the mortgagees had no insurance, and the company is not aided by a provision in the policy that the application was a part thereof and a warranty.<sup>154</sup> But the policy was held void where the agent was

<sup>150</sup> *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 231; 3 Am. Rep. 76.

<sup>151</sup> *Planters' Ins. Co. v. Myers*, 55 Miss. 479; 30 Am. Rep. 521.

<sup>152</sup> *Kansas Protective Union v. Gardner*, 41 Kan. 397; 21 Pac. Rep. 233.

<sup>153</sup> *Boos v. World etc. Ins. Co.*, 64 N. Y. 236; 6 Thomp. & C. (N. Y.) 364; 4 Hun, 133.

<sup>154</sup> *Ætna Live Stock v. Olmstead*, 21 Mich. 246, 251; 4 Am. Rep. 485.

informed by the applicant, in answer to the question as to encumbrances, that he had given a note, but did not know whether it had been entered up or not, and, in response to the question whether he should put down the answer as encumbrance or no encumbrance, said the agent might put it down as he pleased, and it was written in the application by him as no encumbrance.<sup>155</sup>

**§ 500. Where Agent Tells Insured No Answers are Necessary—Application.**—When the company's agent informs the assured that no answers are necessary, and thereafter, without the applicant's knowledge, fills out the application by inserting false answers therein, the company cannot avail itself of such answers in defense to an action on the policy.<sup>156</sup> So the company is estopped to deny its liability where its agent, upon being informed by the applicant that he intended to take out additional insurance, told him it would not be necessary to notify the company until such further insurance was obtained.<sup>157</sup>

**§ 501. Policy Issued on Agent's Representations or Recommendations.**—A policy cannot be avoided by reason of verbal misrepresentations as to the condition of the property made by the company's agent, unless the assured has with full knowledge thereof ratified his acts.<sup>158</sup> And where the agent, being fully informed by the applicant as to the existence of a mortgage on the property, states in his daily report to the company that there is no mortgage, and a policy is issued in consequence, the agent's knowledge is that of the company, and the latter is liable on the policy.<sup>159</sup> In another case, the agent of the company, being informed of the facts, made false statements in the application as to encumbrances on the prop-

<sup>155</sup> *Blooming Grove Mut. F. Ins. Co. v. McAnerney*, 102 Pa. St. 335; 48 Am. Rep. 209.

<sup>156</sup> *Phoenix Ins. Co. v. Stark*, 120 Ind. 444; 22 N. E. Rep. 413.

<sup>157</sup> *Kitchen v. Hartford F. Ins. Co.*, 57 Mich. 135; 58 Am. Rep. 344.

<sup>158</sup> *McGraw v. Germania F. Ins. Co.*, 54 Mich. 145, one judge dissenting.

<sup>159</sup> *Gristock v. Royal Ins. Co.*, 87 Mich. 428; 49 N. W. Rep. 634; affirming 84 Mich. 161; 47 N. W. Rep. 549.

erty, and also stated therein that he had inspected the property, that the answers were correct, and recommended the risk, and it was held that there was a waiver of the condition against encumbrances;<sup>160</sup> and the policy is not avoided by a misrepresentation as to value where the agent certifies that he has examined the risk and recommends its acceptance.<sup>161</sup> And where the agent is fully informed as to the stovepipes and chimneys, pronounces them safe, and recommends the risk, the company is liable on the policy issued.<sup>162</sup>

**§ 502. Where Application Gives Notice of Agent's Limited Authority.**—Where the application gives notice of the agent's limited authority to waive conditions, the assured is bound thereby, as where it provides that the company shall not be bound by any act or statement of its agent not contained in the application.<sup>163</sup> So where the application signed by the insured contains a provision to that effect, the agent's knowledge of the falsity of a warranty will not avail the insured.<sup>164</sup>

**§ 503. Misrepresentations by Agent—Copy of Application or By-laws Annexed to Policy.**—In many of the states, as has been stated, the statute requires that the policy shall contain, or have attached thereto, correct copies of the application, as signed by the applicant, and of the by-laws referred to or relied on, as well as of the constitution and rules of the company. The question, therefore, arises as to how far a receipt of the policy, with a copy of the application annexed,

<sup>160</sup> *Reiner v. Dwelling-House Ins. Co.*, 74 Wis. 89; 42 N. W. Rep. 208.

<sup>161</sup> *Dacey v. Agricultural Ins. Co.*, 21 Hun (N. Y.), 831. See, also, *Continental Ins. Co. v. Pierce*, 39 Kan. 396; 18 Pac. Rep. 291; *Phoenix Ins. Co. v. La Pointe*, 17 Ill. App. 248.

<sup>162</sup> *Waterbury v. Dakota F. & M. Ins. Co.*, 6 Dak. 468; 43 N. W. Rep. 697.

<sup>163</sup> *Holloway v. Dwelling-House Ins. Co.* (St. L. C. A. 1892), 21 Ins. L. J. 379; *Shawmut Mut. F. Ins. Co. v. Stevens*, 9 Allen (Mass.), 332. See *Loekner v. Home Mut. Ins. Co.*, 17 Mo. 247; *Walsh v. Hartford F. Ins. Co.*, 73 N. Y. 5; *Messelbach v. Norman*, 122 N. Y. 578; *Insurance Co. v. Wolff*, 95 U. S. 329.

<sup>164</sup> *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52.

operates to conclude the assured by misrepresentations made by the agent of the company in filling out the application. In such cases, the insured, upon actual receipt of the policy, is enabled to ascertain exactly what representations have been made in the application, and to determine their truth or falsity. Is it, then, incumbent upon him to at once repudiate them, if they are materially false or untrue or incorrect? May he, under certain circumstances, rest upon the belief that the company, through its agent, has filled out the application correctly? Or, to go further, has he a right to assume that the company has waived certain conditions through its agent? Can he subsequently claim that the company is estopped, and that the writing offered in evidence is not the instrument made by him, or that he has been misled to his prejudice? If he is justified in relying upon the company's agent in signing an application without reading it, would he be equally justified, for the same reasons, in not reading the copy of the application annexed to or contained in the perfected contract? What is the object intended to be accomplished by the statutory requirements that the policy shall contain or have attached thereto a copy of the application? These questions are pertinent. Again, assume a case where the assured cannot read. How far would such a party be bound with a knowledge of the contents of the application, even though annexed to the policy, especially where the agent, at the time it was filled out, had assured him that it was all right.<sup>165</sup> In a federal case<sup>166</sup> fraudulent answers regarding the applicant's physical condition were inserted in the application by the agent, whose powers were limited, and notice thereof was given in the application. This was signed, however, by the assured without reading. In the opinion of the court it is said: "Assuming that the answers of the assured were falsified as alleged, the fact would be at once disclosed by the copy of the application annexed to the policy to which his attention was called. He would have discovered by

<sup>165</sup> See on this last suggestion, *Continental Ins. Co. v. Ruckman*, 127 Ill. 364.

<sup>166</sup> *Fletcher v. New York Life Ins. Co.*, 117 U. S. 571; reviewing 95 U. S. 329; 96 U. S. 240; 17 Mo. 247; 18 Wall. (U. S.) 222; 21 Wall. (U. S.) 152; 41 Conn. 168; 39 Conn. 100; 74 Mo. 167; 43 Me. 394.

inspection that a fraud had been perpetrated, not only upon himself, but upon the company, and it would have been his duty to make the fact known to the company. He could not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed. The retention of the policy was an approval of the application and its statements. The consequences of that approval cannot after his death be avoided"; and in this view of the case such answers were held fatal to a recovery. So it is held in another case that the assured is estopped from denying his knowledge of the fraud practiced upon both him and the company by the act of the latter's agent in inserting false answers in the application, where the policy is in his possession and has a copy of the application indorsed thereon, and where the fraud is such that it could have been easily detected by the assured had he read such copy.<sup>167</sup> So the policy is declared in a Maine case<sup>168</sup> to be avoided by a materially false statement inserted in the application by the company's agent, although done without his knowledge, where the contract provides that the assured becomes responsible for the truth of the statements in the application by accepting the policy, and the policy makes the application a part thereof.<sup>169</sup> There are, however, decisions which clearly uphold the opposite doctrine. Thus, where an agent acting for the company signed an application for a fire risk with the name of the assured, but without his authority, consent, or knowledge, and the application contained untrue answers, it was held that the policy was not avoided, even though it was indorsed with a copy of the application,<sup>170</sup> and although the assured in such case fails to give notice to the company that the statements are false.<sup>171</sup> It will be seen, therefore, that the decisions are conflicting. There cer-

<sup>167</sup> *Johnson v. Dakota F. & M. Ins. Co. (N. Dak.)*, 45 N. W. Rep. 799.

<sup>168</sup> *Richardson v. Marine Ins. Co.*, 46 Me. 394; 74 Am. Dec. 459.

<sup>169</sup> See, also, *Goddard v. Monitor Ins. Co.*, 108 Mass. 56; 11 Am. Rep. 307; *Hale v. Mechanics' Mut. F. Ins. Co.*, 6 Gray (Mass.), 169; 66 Am. Dec. 410; *American Ins. Co. v. Nieberger*, 74 Mo. 167.

<sup>170</sup> *State Ins. Co. v. Taylor*, 14 Col. 499; 24 Pac. Rep. 333.

<sup>171</sup> *Donnelly v. Cedar Rapids Ins. Co.*, 70 Iowa, 693.



tainly are circumstances under which the fact that the application with its statements is again presented to the assured when he receives his policy ought not to conclude him any more than it would have done had it not been so brought to his notice. To illustrate: Suppose the agent has advised, dictated, or suggested the answers, and the applicant has relied upon the agent's skill, honesty, and presumed knowledge of the company's requirements, and of what is legally proper and necessary to be done in filling out the application. Do the answers in such case become more binding upon the assured than they would have been had the application not been annexed to or set forth in the policy? Again, in those cases where the agent writes down only such answers or parts of answers as he considers material, or where he assures the applicant that the application is correct or the statements therein all right, or the agent waives certain conditions within the scope of his apparent authority. By what principle would the assured be precluded, in case a copy of the application were annexed, indorsed on, or otherwise contained in the policy, any more than he would be if it were not? We must confess that a careful examination and comparison of the cases fails to discover to us any general rule which will be applicable to all the different cases, nor is there any common ground which affords a basis from which to deduce a satisfactory conclusion which will operate to establish a just rule for both the assured and assurer. There are certainly many decisions which, in holding that the assured is precluded, are just and reasonable, but to these decisions the rule *stare decisis* should not apply, for they do not establish a principle of law, but are rather in the nature of special rulings under the particular circumstances, and the same remarks are equally applicable to other decisions which hold that the assured is not precluded in the class of cases under consideration.

**§ 504. Misrepresentations—Agent's Collusion With Applicant.**—It is assumed that the agent has communicated to his principal all necessary facts concerning the negotiations arising in the course of his agency, and if he honestly discharges his duty to the company he will do so. It is on this

ground that his knowledge is presumed to become the knowledge of his principal, for the protection of innocent third persons. It is, therefore, ordinarily true that the principal is bound by knowledge of such facts as come to the agent in the course of the business.<sup>172</sup> But where the company's agent violates his trust, and colludes with the applicant to cheat and defraud the principal, the applicant cannot avail himself, as against the insurer, of the agent's knowledge in reference to matters to which the co-operation for the fraudulent purpose relates. And it makes no difference whether the acts done in fraud of the principal are intended to promote merely the interest of the applicant or the common interest of the applicant and the agent, for in neither case are such fraudulently concerted acts binding upon the person intended to be defrauded, and the same rule applies whether the agent conspires with the assured to defraud the company by false statements, or whether the act of the applicant is merely permissive. It is sufficient that the latter assents that the agent may insert the false statements in the application, both knowing them to be false;<sup>173</sup> nor can the assured, with knowledge of the extent of an agent's authority, obtain any benefit from a contract made in excess of his authority by collusion by such agent.<sup>174</sup> So in case the agent of a mutual aid association conspires with the applicant to falsely state his age, the company is not bound where the rules of the association forbids the insurance of any person over fifty years of age, and both the agent and the applicant had knowledge of the restriction.<sup>175</sup>

<sup>172</sup> See *Centennial Mut. L. Ins. Assn. v. Parham*, 80 Tex. 518, 520; 16 S. W. Rep. 316, per the court; *Rockford Ins. Co. v. Nelson*, 75 Ill. 548.

<sup>173</sup> See *Centennial Mut. L. Ins. Assn. v. Parham*, 80 Tex. 518; 16 S. W. Rep. 316, per the court; *Blooming Grove Mut. Ins. Co. v. McAnerney*, 102 Pa. St. 335; 48 Am. Rep. 209; *National Ins. Co. v. Finch*, 53 N. Y. 150, per the court; *Lewis v. Phoenix Mut. Ins. Co.*, 39 Conn. 100; *Smith v. Insurance Co.*, 24 Pa. St. 320, per Woodward, J.

<sup>174</sup> *Smith v. Insurance Co.*, 24 Pa. St. 323; *Hanson v. American Ins. Co.*, 57 Iowa. 741; *Galbraith v. Insurance Co.*, 12 Bush (Ky.), 29.

<sup>175</sup> *Hauf v. Northwestern Masonic Aid Assn.*, 76 Wis. 450; 45 N. W. Rep. 315.

§ 505. **Misrepresentations by Agent—Parol Evidence Admissible.**—It may be considered as a well-settled rule that parol evidence is admissible to show that the agent of the company at the time, when acting within the apparent scope of his authority in filling out the application, had been truly and fully informed by the applicant of the facts, or that he had actual knowledge thereof, and that he had nevertheless, without the authority, consent, or knowledge of the applicant, misstated the facts in the application, or that he had omitted to insert certain facts therein.<sup>176</sup> Such evidence is not admitted to vary or contradict the writing, but is based upon the principle that the writing was procured under such circumstances that it cannot lawfully be used against the party whose name is signed to it. It is not his instrument, so far as the claimed erroneous statements are concerned.<sup>177</sup> Thus, it may be shown by the assured that he had signed the application, supposing the answers actually given by him had been written down by such agent.<sup>178</sup> So the circumstances attending the application may be shown by parol evidence.<sup>179</sup> The writing in such case is not the applicant's statement, although signed by him, and the insurance company is estopped to claim that the representation is that of the insured. The error is chargeable to the insurer and not to the insured,<sup>180</sup> for such evidence is admissible, notwith-

<sup>176</sup> *Continental Ins. Co. v. Pierce*, 39 Kan. 396; 18 Pac. Rep. 291; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 831; *Hartford Life Ins. Co. v. Gray*, 80 Ill. 28; *Howard Ins. Co. v. Brunner*, 23 Pa. St. 50; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; 38 Am. Rep. 617; 92 N. Y. 274; 44 Am. Rep. 372; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Bacon on Benefit Societies and Life Insurance*, sec. 458; *McFarland v. Kittaning Ins. Co.*, 134 Pa. St. 590; 19 Am. St. Rep. 723; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; 98 Am. Dec. 332; *Planters' Ins. Co. v. Sorrels*, 1 Baxt. (Tenn.) 352; 25 Am. Rep. 780; *Patten v. Farmers' F. Ins. Co.*, 40 N. H. 383; *Kausal v. Minnesota Farmers' Mut. F. Ins. Co.*, 31 Minn. 17; 47 Am. Rep. 776; *McCall v. Phoenix Ins. Co.*, 9 W. Va. 237; 27 Am. Rep. 558. See note, 77 Am. Dec. 721.

<sup>177</sup> *Union Mut. Ins. Co. v. Wilkinson*, 13 Wall. (U. S.) 222, per Miller, J.

<sup>178</sup> *Smith v. Farmers' etc. Mut. F. Ins. Co.*, 89 Pa. St. 287.

<sup>179</sup> *Planters' Ins. Co. v. Myers*, 55 Miss. 479; 30 Am. Rep. 521.

<sup>180</sup> *Kausal v. Minnesota Farmers' Mut. F. Ins. Co.*, 31 Minn. 17; 47 Am. Rep. 776, per Mitchell, J.

standing the rule that parol evidence is inadmissible to vary or control written contracts; that rule must yield to the rule that the company cannot take advantage of the mistakes, omissions, or misstatements of its agents within the apparent or real scope of their employment.<sup>181</sup> This rule has been upheld where the agent, with full knowledge as to the condition of the premises, misrepresented the facts;<sup>182</sup> where the agent was a soliciting agent, with authority only to fill out and forward applications, and to receive and forward premiums to the company, and he misrepresented as to encumbrances;<sup>183</sup> where the misrepresentation was concerning encumbrances, although the policy provided that the statements in the application should be warranties;<sup>184</sup> where the interest of the assured was wrongly described;<sup>185</sup> where the insured was cheated into signing the application and the policy was issued upon the agent's own false statements;<sup>186</sup> where the building in which the goods were kept was misdescribed, as used for mercantile purposes and one room as a sleeping room, the defense being that it was used as a boarding-house, and the insured had relied upon the agent to prepare the papers;<sup>187</sup> where the policy was signed and incorrectly filled out by the agent after he went to his office, and without the knowledge of the assured;<sup>188</sup> where the defense is a breach of warranty in misrepresenting the title and encumbrances;<sup>189</sup> where the applicant signed, without reading the application, upon the agent's stating that it was all right, and the agent made no inquiries relative to encumbrances.<sup>190</sup> Such evidence is also, in such case, admissible to show a mistake, as that the agent had neglected to insert the name of one of the partners, where the

<sup>181</sup> *Beal v. Park F. Ins. Co.*, 16 Wis. 241; 82 Am. Dec. 719; *Menk v. Home Mut. Ins. Co.*, 76 Col. 50; 14 Pac. Rep. 837.

<sup>182</sup> *Menk v. Home Mut. Ins. Co.*, 76 Col. 50; 18 Pac. Rep. 117.

<sup>183</sup> *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa. 253.

<sup>184</sup> *North American Ins. Co. v. Throop*, 22 Mich. 146; 7 Am. Rep. 638.

<sup>185</sup> *Hough v. C. F. I. Co.*, 29 Conn. 10; 76 Am. Dec. 581.

<sup>186</sup> *Klister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553; 18 Atl. Rep. 447; 5 L. R. Annot. 646.

<sup>187</sup> *Texas Banking & Ins. Co. v. Stone*, 49 Tex. 4.

<sup>188</sup> *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306; 32 N. W. Rep. 610.

<sup>189</sup> *Combs v. Hannibal S. & Ins. Co.*, 43 Mo. 148; 97 Am. Dec. 383.

<sup>190</sup> *Gelb v. International Ins. Co.*, 1 Dill. (C. C.) 443.

policy was taken out on the whole partnership property,<sup>191</sup> although such evidence of mistake is not admissible in courts of law, except on the ground of estoppel or waiver.<sup>192</sup> It is likewise admissible to show the acts and declarations of such agents either at the time of taking the risk or renewing the same.<sup>193</sup> So evidence is competent that the agent agreed to note in the application the existence of an encumbrance on the property,<sup>194</sup> and statements made by the agent, in answer to printed interrogatories on the back of a blank application furnished by the company, are admissible to show that the agent had knowledge of the facts and of the falsity of the statements written in the application by him.<sup>195</sup> So it is decided in another case that the agent's report to the company made after the application, which contained a misstatement as to encumbrances, is inadmissible against the insured.<sup>196</sup> But it is held, however, that the assured can avail himself of the right to introduce such parol evidence only by the proper allegations.<sup>197</sup> In a New York case the assured defended on the ground of a breach of warranty in omitting to mention in the application an encumbrance on the property, and the court excluded evidence to show that the agent was informed of the mortgage, but omitted to mention it in the application, but offered to allow the plaintiff to amend, alleging the mistake. This offer the plaintiff refused, and he was nonsuited. Thereafter, but not within the year limit provided in the policy, another suit was brought, and it was held not maintainable.<sup>198</sup>

<sup>191</sup> *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; 98 Am. Dec. 332.

<sup>192</sup> *Examine Cooper v. Farmers' M. F. Ins. Co.*, 50 Pa. St. 290; 88 Am. Dec. 544.

<sup>193</sup> *Beal v. Park F. Ins. Co.*, 16 Wis. 241; 82 Am. Dec. 719.

<sup>194</sup> *Copeland v. Dwelling-House Ins. Co.*, 77 Mich. 554; 43 N. W. Rep. 991.

<sup>195</sup> *Continental Ins. Co. v. Pierce*, 39 Kan. 396; 18 Pac. Rep. 291.

<sup>196</sup> *Phoenix Ins. Co. v. La Pointe*, 17 Ill. App. 248.

<sup>197</sup> *Sullivan v. Cotton States etc. Ins. Co.*, 43 Ga. 423; *Texas Banking Co. v. Stone*, 49 Tex. 4; *O'Donnell v. Connecticut F. Ins. Co.*, 73 Mich. 1; 41 N. W. Rep. 95.

<sup>198</sup> *Arthur v. Homestead F. Ins. Co.*, 78 N. Y. 462; 34 Am. Rep. 550; Mr. Browne, in his excellent work on parol evidence, agrees with the rule as stated in the text, and cites numerous cases with the conditions appended where it has been sustained: *Browne on Parol Evidence*, pp. 106-15, sec. 48; pp. 74, 75, sec. 42. He also refers to and considers cases holding the contrary doctrine.

§ 506. **Samé Subject—The Opposing View.**—It is not doubted but that parol evidence is competent of a mistake or fraud in an action on the contract where the statement is a mere representation and not a warranty, without resort to a court of equity;<sup>199</sup> and the policy of courts of equity has been and is to grant relief, by way of reformation or otherwise, on the ground of mistake or fraud in cases of warranty. Many of the courts have refused to go beyond the rule stated in the first proposition, while others have expressly decided that the only remedy in such cases as are under consideration is in courts of equity. Thus it is held in a recent Texas case<sup>200</sup> that the assured cannot, in an action on the policy, overcome the defense that certain answers are false by evidence that the agent wrote down the answers, and that he signed the application without knowledge of its contents. The policy in this case limited the powers of the agent, and provided that the company would not be bound by any representation or information received by its agent, or any promise made by him not contained in the application. So parol evidence is held inadmissible, in an action on the policy, to show that a false description of the premises was inserted in the application by the agent, he knowing at the time that the property was used for a purpose which would come under a more hazardous class, and the premium for which was higher, such evidence not being competent to prove that under the description adopted, the defendant intended to insure the premises as in fact occupied and used.<sup>201</sup> The doctrine of *Insurance Company v. Wilkinson*<sup>202</sup> is criticised by the court in the last case as establishing a rule that parol evidence is admissible to vary or alter a written contract. In another case the defendants agreed to insure a building occupied as a store and the stock of goods therein, the terms employed being a warranty under the policy that the building was used for the purpose specified. An action of assumpsit was brought on the policy to recover a loss. The company proved on the trial of

<sup>199</sup> *State Mut. Ins. Co. v. Arthur*, 30 Pa. St. 315.

<sup>200</sup> *Fitzmaurice v. Mut. L. Ins. Co.*, 84 Tex. 61; 19 S. W. Rep. 301.

<sup>201</sup> *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. (11 Vroom) 568; 29 Am. Rep. 271; three judges dissenting.

<sup>202</sup> 13 Wall. (U. S.) 235.

the case that a private stable was kept on the premises, from the date of the policy up to the time of the fire, which use, under the conditions of the policy, avoided it as an extrahazardous risk. To offset the defense it was attempted to be shown that the policy was obtained for the plaintiff by the agent of the defendant company, and that he was informed and knew that the building in question was, at the time of procuring said policy, used as a stable. Such evidence was held inadmissible, as tending to vary the terms of a written contract.<sup>202a</sup> And it

<sup>202a</sup> *Deweese v. Manhattan Ins. Co.*, 35 N. J. L. (6 Vroom) 366. The court said: "The assumption is, and must be, that the warranty in its present form was a mistake of the agent. But a mistake cannot be corrected, in conformity with our judicial system, in a court of law. No one can doubt that in a proper case of this kind an equitable remedy exists. . . . It is possible, therefore, that in this case in equity the present contract might be reformed so as to contain a permission for the plaintiff to keep his stable in this building; but I think it has never been supposed that this end could be reached in this state by proof before the jury in a trial at the circuit. The principle would cover a wide field, for if this mistake can be there corrected, so can every possible mistake. If the plaintiff can modify the stipulation, with respect to the restricted use of the premises, on the plea of a mistake in such stipulation, on similar grounds it would be open to the company to modify the policy with respect to the amount insured. I am at a loss to see how, on the adoption of the principle claimed, we are to keep separate the functions of our legal and equitable tribunals. Nor do I think, if this court should sustain the present action, that it could be practicable to preserve in any useful form the great primary rule that written instruments are not to be varied or contradicted by parol evidence." The court then, considering the question of estoppel, says its application to written contracts in such cases is an entire novelty, and would accomplish, by circuitry of action, precisely the same results as though the instrument had been reformed in conformity to the claimed evidence "that the facts now before us do not present the elements of an estoppel. Such a defense rests on a misconception as to a state of facts induced by the party against whom it is set up. The person who seeks to take advantage of it must have been misled by the words or conduct of another. Now, in the present case, the agent did not make any statement, nor did he do anything which led the plaintiff to alter his condition. The most that can be laid to his charge is that from carelessness he omitted properly to describe the use of the premises insured. But this was not a misstatement of a fact on which the plaintiff acted, because the plaintiff was aware of the circumstances that the building was put to another use."

was declared that "the alleged error in the description is plain on the face of the policy, and the law incontestably charges the defendant with knowledge of the meaning and legal effect of his own written contract. Certainly, the entire state of things was as well known to the plaintiff as it was to the agent of the defendants. To found an estoppel on the ignorance of the plaintiff of the plainly expressed meaning of his own contract would be absurd."<sup>203</sup>

**§ 507. Same Subject—Where Agent's Authority is Limited.**—In an Iowa case it is held that evidence is not admissible to show that the agent wrote down the statements incorrectly or otherwise, where the agent's authority was limited to receiving and forwarding applications for insurance, but that the rule would be to the contrary where the agent had power to issue, and did issue, the policy without submitting it to his principal.<sup>204</sup> So where the agent had authority only to receive applications and transmit policies, and he described the building as containing only one chimney, it was held that parol evidence was inadmissible that the agent had knowledge that the facts were to the contrary, and that he agreed with the applicant that a proper chimney and secured pipe should be put in before a fire should be lighted.<sup>205</sup> In a Connecticut case<sup>206</sup> a distinction is made between the attempt to prove that truthful

<sup>203</sup> *Deweese v. Manhattan Ins. Co.*, 35 N. J. L. (6 Vroom) 366; citing *Jennings v. Chenango Mut. Ins. Co.*, 2 Denio (N. Y.), 75; *Kennedy v. St. Lawrence Co. Mut. Ins. Co.*, 10 Barb. (N. Y.) 285; *Vandervoort v. Columbia Ins. Co.*, 2 Calnes (N. Y.), 155; *Weston v. Elmes*, 1 Taunt. 115; *Parks v. General Int. Assur. Co.*, 5 Pick. (Mass.) 34; *Angell on Fire and Life Insurance*, secs. 20, 21, and other authorities; denying *Plumb v. Cattaraugus Co. Mut. Ins. Co.*, 18 N. Y. 392; 72 Am. Dec. 526. See, also, *Sheldon v. Hartford F. Ins. Co.*, 22 Conn. 335; 58 Am. Dec. 420; *Barrett v. Mutual Ins. Co.*, 7 Cush. (Mass.) 175; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362; and cases cited and considered in *Browne on Parol Evidence*, pp. 74, 75, sec. 42; p. 106, et seq; sec. 48. *Examine New York Life Ins. Co. v. Fletcher*, 117 U. S. 519.

<sup>204</sup> *Ayres v. Hartford etc. F. Ins. Co.*, 17 Iowa, 170; 85 Am. Dec. 553.

<sup>205</sup> *Smith v. Insurance Co.*, 24 Pa. St. 320.

<sup>206</sup> *Ryan v. World Mut. Life Ins. Co.*, 41 Conn. 168; 19 Am. Rep. 490.



answers were given to the interrogatories and that the incorrect answers written in the application were those of the agent, and the attempt to show that different answers were given and that the local agent, without the consent or knowledge of the insured, wrote down wrongly the answers. The court declared that the latter was an effort to substitute for a part of the written contract another and different parol contract, which could not be done, but that in the first case the question whether the defendant company would be bound would depend upon the extent of the agent's authority. The express authority of the agent here was limited to receiving the application, forwarding it to the home office, receiving, countersigning, and delivering the policy, and collecting the premiums. The application was a part of the policy. The representations or warranties related to the health of the insured. Truthful answers were given, but were written incorrectly by the agent. The court held that the agent had no authority to bind the company by false answers.

**§ 508. Agent of Insured—When Such Provision in Policy is Inoperative.**—A question which has been the source of much litigation is, whether the company's agent, with apparent authority to act for it, in procuring the insurance and preparing the application, is made the agent of the insured, in transactions relating to the insurance, by a provision to that effect inserted in the policy. The provision is substantially this, that any person other than the assured who procures the insurance for the company shall be deemed the agent of the assured, and not of the company, under any circumstances or in any transactions relating to the insurance. While this provision has been held operative in some cases,<sup>207</sup> it has met with an almost universal condemnation on the part of the courts, and has been declared ineffectual to accomplish the purpose intended by the insurer. Such a stipulation in the policy cannot be presumed to have entered into the contemplation of both the parties to the contract when it was not known to the assured at any time prior to the delivery of the policy, or where he had

<sup>207</sup> See sec. 527 herein.

no knowledge of the intention to so stipulate at the time of contracting. The company cannot escape the consequences of the fraud, mistake, or negligence of its agent by such a provision;<sup>208</sup> nor can it change the ostensible authority which the agent has been held out by the company to possess. It cannot be a valid rule of law that a party can abrogate the authority of the agent so soon as the agent has accomplished the purpose which he was appointed to perform. Strong language has been used by some of the courts in discussing this question. Thus it is said in a New York case:<sup>209</sup> "This is a provision which deserves the condemnation of courts whenever it is relied upon to work out a fraud, as it is in this case. The policy might as well say that the president of the company should be deemed the president of the insured. Such a clause is no part of a contract. It is an attempt to reverse the law of agency, and to declare that a party is not bound by the agent's acts." It is also declared in a leading case<sup>210</sup> that agents authorized to procure applications for insurance, and to forward them to the company for acceptance must be deemed the agents of the insurer, and not of the insured, in all that they do in preparing the application or in making representations to the insured as to the character or effect of the statements contained in the application. Such a rule rests not only on principle, but on considerations of public policy, and also upon the fact that the present manner and methods of doing business by insurance companies in sending agents abroad to procure insurances, and by stimulating them to their best efforts by various inducements, makes the business one of the sale of insurances, and agents hold themselves out with the consent of the companies as representing them in all that is said and done in regard to the application, and the public so look upon them, and had a right so to do. And the court says: "It would be a stretch of legal principles to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the

<sup>208</sup> *Ellenberger v. Protective etc. Ins. Co.*, 80 Pa. St. 464, per the court.

<sup>209</sup> *Partridge v. Commercial Ins. Co.*, 17 Hun, 95, per Learned, J.

<sup>210</sup> *Kausal v. Minnesota Farmers' etc. Assn.*, 31 Minn. 17; 47 Am. Rep. 776.

matter in hand, could be affected by notice given after the negotiations were completed, that the party with whom he had dealt should be transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that by a stipulation unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence we think that if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued. Neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer, through its agent, of all matters pertaining to the application at the time it was made. We are aware that in so holding we are placing ourselves in conflict with the views of some eminent courts. But the conclusion we have reached is not without authority to sustain it, and is, we believe, sound in principle and in accordance with public policy."<sup>211</sup> So it is held in New York that the company can-

<sup>211</sup> See, also, *Piedmont etc. Ins. Co. v. Young*, 58 Ala. 476; 29 Am. Rep. 770; *Commercial F. Ins. Co. v. Allen*, 80 Ala. 571, 576; 1 S. Rep. 202; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Commercial Ins. Co. v. Ives*, 56 Ill. 402; *Boetcher v. Hawkeye Ins. Co.*, 47 Iowa, 253; *McArthur v. Insurance Co.*, 35 N. W. Rep. 430, and note; *Continental Ins. Co. v. Pierce*, 39 Kan. 396; 18 Pac. Rep. 291 (annotated case); *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170; *Planters' Ins. Co. v. Myers*, 55 Miss. 479; 30 Am. Rep. 521; *Gates v. Penn. F. Ins. Co.*, 10 Hun (N. Y.), 489; *White v. Germania F. Ins. Co.*, 76 N. Y. 415; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Partridge v. Commercial F. Ins. Co.*, 17 Hun (N. Y.), 95; *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128; *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Susquehanna Mut. F. Ins. Co. v. Cusick*, 109 Pa. St. 157; *Insurance Co. v. Lee*, 73 Tex. 641; *Grau v. American Cent. Ins. Co.*, 109 N. Y. 278; *Insurance Co. v. Mahone*, 21 Wall. (U. S.) 152; *Bassell v. American F. Ins. Co.*, 2 Hughes (C. C.), 531; note, 82 Am. Dec. 723. An agent of a foreign company is not an agent of insured: *Commercial Ins. Co. v. State ex rel.*, 113 Ind. 331, 336.

not make its agent in fact the agent of the applicant, by a stipulation to that effect in the policy.<sup>212</sup> So, also, in Indiana it is decided that a condition that the agent is the agent of assured is void, as applied to a local agent upon whose countersignature the policy depends.<sup>213</sup> And in Washington the fact that the policy recites that the soliciting agent shall be assured's agent does not make him such where he is in fact assurer's agent.<sup>214</sup> So the fact that the company instructs its agent to regard himself as the applicant's agent does not alter the rule, such instructions being unknown to the applicant.<sup>215</sup> So the company is bound, notwithstanding such provision, where the agent receives a policy through an insurance broker and delivers it to the assured, although the assured's interest was not stated therein as required.<sup>216</sup> And where a local agent, acting for several companies, is directed to and does obtain policies for the assured in the companies which he represents, he is agent of the insurer, and not of the insured.<sup>217</sup> So where the policy contains a warranty that a diagram of the premises is correct, and it is not, the solicitor who obtained the same is the company's agent.<sup>218</sup> So an agent authorized to procure applications and forward them to the company for acceptance or rejection is the company's agent,<sup>219</sup> and a subagent employed by a local agent, in pursuance of a custom known to and approved by the company, to solicit and forward applications is the company's agent.<sup>220</sup> In another case the policy provided, in addi-

<sup>212</sup> *Bernard v. United Life Ins. Assn.* (N. Y. 1895), 33 N. Y. Supp. 22; 66 N. Y. St. Rep. 521.

<sup>213</sup> *North British etc. Ins. Co. v. Crutchfield*, 108 Ind. 518, 528.

<sup>214</sup> *Hart v. Niagara F. Ins. Co.*, 9 Wash. 620.

<sup>215</sup> *Beebe v. Hartford Mut. F. Ins. Co.*, 25 Conn. 51.

<sup>216</sup> *Partridge v. Commercial Fire Ins. Co.*, 17 Hun (N. Y.), 95. See, also, *McGraw v. Germania F. Ins. Co.*, 54 Mich. 146. *Examine Fame Ins. Co. v. Mann*, 4 Ill. App. 485; *Kings Co. F. Ins. Co. v. Swigert*, 11 Brad. 590; *Pottsville Mut. F. Ins. Co. v. Minnequa Springs Imp. Co.*, 100 Pa. St. 137.

<sup>217</sup> *Commercial Union Assur. Co. v. State*, 113 Ind. 331; 15 N. E. Rep. 518.

<sup>218</sup> *Spratt v. New Orleans Ins. Co.*, 53 Ark. 215; 13 S. W. Rep. 799.

<sup>219</sup> *State Ins. Co. v. Jordan*, 29 Neb. 514; 45 N. W. Rep. 792; *Dietz v. Providence & Washington Ins. Co.*, 31 W. Va. 851; 8 S. E. Rep. 616. *Woodbury etc. Bank v. Charter Oak etc. Ins. Co.*, 31 Conn. 517.

<sup>220</sup> *Woodbury Bk. v. Charter Oak etc. Ins. Co.*, 31 Conn. 517.

tion to such clause, that the application must be made out by the company's authorized agent, and it was held that the agent represented the company, and not the insured;<sup>221</sup> and the same is true where the validity of the policy is made to depend on the countersignature of the agent,<sup>222</sup> and the same rule obtains where such provision in the policy, as to agency, is obscure or ambiguous.<sup>223</sup> So an agent who takes an application for a life insurance is the company's agent, notwithstanding such condition, where the paper signed by him purports to be that of an agent of the company, and there is no proof that he had an agency for the applicant;<sup>224</sup> nor is the company's agent made the agent of the insured by the fact that one of the trustees of the insured building agreed with the agent that the latter should place the insurance.<sup>225</sup> Again, an insurance company, whose agent indorses upon a policy issued by him that a mortgage is in the process of foreclosure for the purpose of perfecting the title and delivers such policy to other insurance agents with a statement that it is contrary to his orders to write policies on mortgaged property, but that he will submit it to his company, is liable on the policy for a loss occurring two days later if the policy is delivered to the insured by such agent, and the premium obtained from him without notice of the nature of the transaction or of any limitation on the power of the agent issuing the policy, although it contains a provision that in matters relating to the procuring of insurance no person, unless duly authorized in writing, shall be deemed the agent of the company.<sup>226</sup> There is another class of cases wherein the stipulation in the policy, although different, is intended to accomplish the same result as the clause set forth at the beginning of this section. This provision is, in substance, that the company shall not be bound by statements made by or to any agent or

<sup>221</sup> *Sprague v. Holland Purchase Ins. Co.*, 69 N. Y. 128.

<sup>222</sup> *North British etc. Ins. Co. v. Crutchfield*, 108 Ind. 518; 7 West Rep. 85.

<sup>223</sup> *Sullivan v. Phoenix Ins. Co.*, 34 Kan. 170.

<sup>224</sup> *Rawls v. M. L. Co.*, 27 N. Y. 294; 84 Am. Dec. 280.

<sup>225</sup> *Commercial Ins. Co. v. State (Ind.)*, 13 West. Rep. 47. See sec. 527 herein.

<sup>226</sup> *Miller v. Scottish Union & Nat. Ins. Co.*, 101 Mich. 49; 45 Am. St. Rep. 389.

other person procuring the insurance, unless such statements are in writing in the application when the same is received by the company at its home office. This clause has been held to be inoperative to effect the purpose intended by the company.<sup>227</sup>

**§ 509. Same Subject—Mutual Companies and Benefit Society.**—The rule that the company cannot, by a provision in the policy, convert its agent into the agent of the assured, in the absence of knowledge by the latter of such stipulation, is applicable to mutual companies, and such agent is not an agent of the assured because a by-law or the policy so provides. He is nevertheless the company's agent, and his acts in the matter of the application within the apparent scope of his authority binds the company.<sup>228</sup> And this rule should be equally applicable to mutual benefit societies whenever the facts are similar.<sup>229</sup> The rule laid down in a Minnesota case<sup>230</sup> is, that agents of an insurance company authorized to procure applications for insurance and to forward them to the company for acceptance must be deemed the agents of the insurers in all that they do in preparing the application, or in any representations they may make as to the character or effect of the statements therein contained, and applies in the case of a mutual benefit association organized for the purpose of indemnifying its members on account of accidents occurring to them, the necessary money being raised solely by assessments upon said members.<sup>231</sup> But in a New York case the company was a

<sup>227</sup> *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304; 10 Sup. Ct. Rep. 87; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196; *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646. But see sec. 527 herein.

<sup>228</sup> *Klister v. Lebanon Mut. Ins. Co.*, 128 Pa. St. 553; 18 Atl. Rep. 447; 5 L. R. Annot. 646; *Ellenberger v. Protective etc. Ins. Co.*, 89 Pa. St. 464; *Clark v. Union F. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721; *Nassauer v. Susquehanna Mut. F. Ins. Co.*, 109 Pa. St. 507; *Kausal v. Minnesota Farmers' Mut. F. Ins. Assn.*, 31 Minn. 17; 47 Am. Rep. 776; *Masters v. Madison etc. Ins. Co.*, 11 Barb. (N. Y.) 624.

<sup>229</sup> This last is also Mr. Bacon's conclusion: *Bacon on Benefit Societies and Life Insurance*, sec. 158.

<sup>230</sup> *Kausal v. Minnesota Farmers' etc. Assn.*, 31 Minn. 17; 16 N. W. Rep. 430; 47 Am. Rep. 776.

<sup>231</sup> *Whitney v. National Masonic Acc. Assn.*, 57 Minn. 472; 59 N. W. Rep. 943.

co-operative one. The act under which it was organized provided that every person insured in such companies should sign a written application for such insurance, as required by the articles of association and by-laws of the company, and thereby become a member thereof. The application signed by the assured required that it be received at its office in a certain city, and that it be signed by some director or agent thereof, otherwise the company would not be bound. The agent effecting the insurance informed assured that upon his signing the application and paying the fee the insurance would be in force from that time. No policy was delivered and it was held that there could be no recovery.<sup>232</sup>

**§ 510. Authority of Subordinate Officers of Benefit Association to Waive Requirements as to Application.** Although no formal application has been made, and no physical examination had as required under the by-laws of a benefit association or relief department of a railroad company, organized for the benefit and protection of railroad employees in case of sickness or death, nevertheless the company may be estopped to deny the membership where the department is under the general management of a superintendent, and the member has become such by the acts of the department, even though in a manner different from that prescribed by the by-laws, and where all the steps toward that end are made with the knowledge of the superintendent. In such case there is no question of the right of subordinate employees to waive re-

<sup>232</sup> *Allen v. St. Lawrence Farmers' Ins. Co.*, 88 Hun (N. Y.), 461. The court said: "There is no proof that Crandall had any authority to make any other or different agreement than that provided for in the by-laws and requirements of the company. Indeed, there is no proof that he had any authority to make any agreement whatever for insurance, or to do anything beyond soliciting and receiving applications for insurance. He did not appear to be clothed with authority to contract for the company. He was not provided with policies, and did not deliver any. The plaintiff must have understood that the policies were only issued by the company from its office at Ogdensburg, and that an insurance was not effected until his application reached there and was acted upon. The mere declaration of Crandall that the insurance began at once was ineffectual to bind the company": *Id.* 462, per Fursman, J.

quirements, as their acts, under the circumstances, are those of the department.<sup>233</sup>

**§ 511. Agents of Insured—Knowledge of Insured.—**

If the insured, however, has notice or knowledge before the negotiations are completed that stipulations of the character of those under consideration are to be inserted therein, or if they, or either of them, are contained in the application, it is held that the insured is bound to see that his statements and representations are true.<sup>234</sup>

**§ 512. Statutes—Soliciting Agent is Company's Agent.**

In a majority of the states the legislature has intervened, by enacting statutes which make any person other than the applicant who solicits, procures, or transmits applications the agent of the company or association.<sup>235</sup> A recent writer criticises these laws as "the cause of much injustice" if "the courts were not wiser than the legislatures";<sup>236</sup> but such statutes are, however, constitutional.<sup>237</sup> And it is also declared that they

<sup>233</sup> Burlington Vol. Relief Department of Chicago v. White, 41 Neb. 547; 43 Am. St. Rep. 701.

<sup>234</sup> Atlantic Ins. Co. v. Carlin, 58 Md. 336. See secs. 508, 514 herein. South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co., 2 S. Dak. 17; 48 N. W. Rep. 310; Planters' Ins. Co. v. Myers, 55 Miss. 500; 30 Am. Rep. 524. Examine Bartholomew v. Merchants' Ins. Co., 25 Iowa, 507; 96 Am. Dec. 65.

<sup>235</sup> Conn. Gen. Stat. 1888, secs. 2398, 2923; Georgia Laws, 1887, p. 121, sec. 9; Iowa (McLain's) Code, 1888, sec. 1732; 18 G. A., c. 211, sec. 1; Maine Rev. Stat. 1883, p. 445, sec. 19; Mass. Acts, 1887, c. 214, sec. 87; Miss. Annot. Code, 1892, sec. 2327; Mo. Rev. Stat. 1889, sec. 5915; Neb. Comp. Stat. 1891, c. 16, sec. 8; N. H. Laws, 1889, c. 94, sec. 2; N. Dak. Laws, 1891, p. 203, sec. 28; Ohio Rev. Stat. 1890 (Smith & B.), sec. 3644; Oklahoma Stat. 1890, p. 637, sec. 23; R. I. Pub. Laws, Jan. 1884, p. 55, sec. 7; Pub. Laws, Jan. 1885, p. 63, sec. 1; S. C. Stat. 1883, p. 460, sec. 6; Vt. Rev. Laws, 1880, sec. 3620, p. 697; Va. Acts, 1887, p. 349, c. 271, sec. 5; Wis. (Sanborn & B.) Annot. Stat. 1889, vol. 1, p. 1186, sec. 1977. Under a statute making one who solicits insurance and receives compensation the agent of company, service of process may be made on him a year and a half after policy issues, even though the policy makes such agent assured's agent only: Fred Miller Brewing Co. v. Council Bluffs Ins. Co. (Iowa, 1895), 63 N. W. Rep. 565.

<sup>236</sup> Ostrander on Fire Insurance, sec. 34, p. 102.

<sup>237</sup> Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304.



control stipulations in the policy to the contrary.<sup>238</sup> Under the Iowa statute, any person who solicits insurance, or procures applications therefor, is the soliciting agent of an insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application to the contrary, notwithstanding; a person who procures an application for insurance is the company's agent, and the company cannot make him assured's agent by any stipulation or provision in the application, nor by any indorsement on the back of the policy issued on said application.<sup>239</sup> Again in the same state it is held that a person is agent of the company where the insured applies to him for insurance, and he procures it from the recording agents of a company, who are authorized to accept risks and issue the policy, and that the company was responsible for mistakes occurring between such person and such agent.<sup>240</sup> It is also held in that state that the person procuring an application is the company's agent, not only in soliciting insurance but in drawing up the policy, and that information to him as to the true state of the title bound the company.<sup>241</sup> Under the Wisconsin statute,<sup>242</sup> whoever solicits insurance on behalf of any insurance company, or transmits an application to such company, or a policy to or from such corporation, or collects or receives any premium for insurance, or in any manner acts or assists in doing either, or in transacting business for such company, must be deemed and held to be an agent of such corporation, to all intents and purposes, in each of the several things mentioned, and the company cannot disclaim his agency in the doing of anything necessarily implied in the specific acts thus authorized.<sup>243</sup> So the agent represents the company and not the assured, under the statute of that state, although there

<sup>238</sup> *Continental Life Ins. Co. v. Chamberlain*, 132 U. S. 304.

<sup>239</sup> *Continental Ins. Co. v. Chamberlain*, 132 U. S. 304.

<sup>240</sup> *St. Paul F. & M. Ins. Co. v. Sharer*, 76 Iowa, 232; 41 N. W. Rep. 15.

<sup>241</sup> *Jamison v. State Ins. Co.*, 85 Iowa, 229; 52 N. E. Rep. 185.

<sup>242</sup> Rev. Stat., sec. 1977.

<sup>243</sup> *Bourgeois v. Mutual Fire Ins. Co.*, 86 Wis. 402, 405; 57 N. W. Rep. 38, per Cassoday, J.; *Rentler v. Dwelling-House Ins. Co.*, 74 Wis. 89, 95, per Cassoday, J. See, also, *Continental Ins. Co. v. Chamberlain*, 132 U. S. 304.

is no communication between it and the assured, and the latter had applied to the agent for insurance, and he had placed the risk in companies represented by other agents. And in such case knowledge by the agent that the building was unoccupied binds the company.<sup>244</sup> In another case in the same state A, in pursuance of a local custom, by agreement with B, both being insurance agents, placed insurance in two companies represented by B, but not by A. The policies were issued, A delivered the policies, which were countersigned by B, and collected the premiums, and commissions were divided between A and B. The assured did not know of the agreement between A and B, nor that A was not the agent of the insurers. It was held that A's knowledge at the time the application was made, as to further insurance, bound the company, and that he was an agent of the two companies under the statute of that state.<sup>245</sup> It is also declared in the same state that by the word "whoever" in the statute<sup>246</sup> is meant an authorized agent of the company.<sup>247</sup> So, under an Indiana statute, one who negotiates for policies of insurance for a commission paid by the company is an agent of the company, although he has no authority to bind the company by contracts.<sup>248</sup>

**§ 513. Cases Holding that Agent is Agent of Insured.**

Notwithstanding the rule that the agent procuring and filling out the application is, in all acts within the apparent scope of his authority, the agent of the company, even though the policy provides to the contrary, except the assured has knowledge of limitations upon his authority, there are well-considered cases which hold that such provision in the policy is binding, and makes the agent the agent of the assured.<sup>249</sup> It is also held

<sup>244</sup> *Alkan v. N. H. Ins. Co.*, 53 Wis. 136.

<sup>245</sup> *Schonler v. Hekla Fire Ins. Co.*, 50 Wis. 575. See *Knox v. I. & J. coming Fire Ins. Co.*, 50 Wis. 671; *Mathers v. Union Mut. Acc. Assn.*, 73 Wis. 589; 11 L. R. 83.

<sup>246</sup> Rev. Stat. Wis., sec. 1977.

<sup>247</sup> *Hankins v. Rockford Ins. Co.*, 70 Wis. 1; 35 N. W. Rep. 34, per the court.

<sup>248</sup> *Ford v. Buckeye St. Ins. Co.*, 6 Bush (Ky.), 133; 99 Am. Dec. 663.

<sup>249</sup> *Wood v. Firemen's Ins. Co.*, 126 Mass. 316; *Rohrbach v. Germania Ins. Co.*, 66 N. Y. 464; 23 Am. Rep. 76; *Grace v. American Cent.*

that where the policy recites that the statements in the application are those of the applicant, and that the company will not be bound by any act or statement not written in the application, that such stipulation binds the assured;<sup>250</sup> and the courts have sustained such a condition, when contained in the application, where there are similar recitals in the policy.<sup>251</sup> So in case the policy contains such provision, also the other provision that the agent procuring the application is the agent of the insured, it is declared that the assured is bound thereby.<sup>252</sup> It is intimated that if the company's agent fills up the application at the request of the insured, he then becomes the latter's agent.<sup>253</sup> And it is expressly declared in a New York case<sup>254</sup> that an agent authorized to receive and forward applications was the agent of the assured where he wrote in the answers to a signed application, under an agreement with the insured, and misstated the facts as to encumbrances. And the same decision was given where the surveyor of a mutual company failed to properly describe the buildings, and the act of incorporation

manila Ins. Co., 66 N. Y. 464; 23 Am. Rep. 76; *Grace v. American Cent. Ins. Co.*, 16 Blatchf. (C. C.) 433.

<sup>250</sup> *Kabok v. Phoenix Mut. L. Ins. Co.*, 4 N. Y. Supp. 718; *Clevenger v. Mutual L. Ins. Co.*, 2 Dak. 114; *Lockner v. Home Ins. Co.*, 17 Mo. 247; *Shawmut Ins. Co. v. Stevens*, 9 Allen (Mass.), 332; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519; *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52; *Lycoming Ins. Co. v. Langley*, 62 Md. 196; *Bleakley v. Niagara Dist. Mut. F. Ins. Co.*, 16 Grant Ch. (U. C.) 198; *McCullough v. Mutual L. Ins. Co.*, 55 Hun (N. Y.), 103; 124 N. Y. 642; *Moore v. Connecticut Mut. F. Ins. Co.*, 41 U. C. Q. B. 497; *Simons v. New York Life Ins. Co.*, 38 Hun (N. Y.), 309; *Enos v. Sun Ins. Co.*, 67 Cal. 621. But see sec. 515, herein.

<sup>251</sup> *Holloway v. Dwelling-House Ins. Co.* (St. L. C. A. 1892), 21 Ins. L. J. 379.

<sup>252</sup> *Shawmut v. Mut. F. Ins. Co.*, 9 Allen (Mass.), 332, and cases cited in note preceding last.

<sup>253</sup> See *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Fame Ins. Co. v. Mann*, 4 Ill. App. 485; *Young v. Insurance Co.*, 22 Atl. Rep. 32. But examine *Clark v. Union etc. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721; *Patten v. Merchants' etc. Ins. Co.*, 40 N. H. 375; 2 Wood on Fire Insurance, 2d ed., sec. 412, p. 846, et seq. We agree, however, with Mr. Wood, that "it would make no difference whether the agent is to be treated as the agent of the insurer or the assured, as knowledge on his part, in reference to the risk is the knowledge of the company": *Id.*, p. 847.

<sup>254</sup> *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497.

made the insured a member of the company and bound by its by-laws, and the by-laws made the surveyor the agent of the applicant.<sup>255</sup> In another case it was held reversible error where the court charged that an agent procuring the insurance was the company's agent, where the sole evidence was the testimony of the latter that he acted for the assured, and told him that he represented several reliable companies.<sup>256</sup>

**§ 514. Misrepresentations of Insurer's Agent to Induce Insurance.**—Where an agent of the company acting within the apparent scope of his authority, by means of false representations, deceit, or fraud, induces another to insure in the company, the latter is obligated thereby, or the insured may rescind or may defend in an action on the premium note. It is essential, however, that the representation should be made in the course of the agent's employment, for the company is not bound if the agent's want of authority to make a contract for it, was known, nor if the act, however extensive the agent's authority, was done in his private capacity. The insurer, by employing the agent, puts trust and confidence in his skill and integrity. In addition to this, he puts him in a position whereby he is enabled to accomplish the deceit and to mislead the insured to his prejudice. It would, therefore, seem more reasonable that the insurer should be the loser, rather than an innocent third party. This rule should, perhaps, be more strictly enforced in contracts of insurance, especially of fire and marine risks, than in case of other contracts;<sup>257</sup> for insurance is a contract necessitating good faith, and requires, especially in marine risks, that material statements, both of the assured and the assurer, should be substantially true, nor should there be any fraudulent concealments of material facts by either party.<sup>258</sup> A distinction should, however, be made as to those

<sup>255</sup> *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. (Pa.) 348.

<sup>256</sup> *East Texas F. Ins. Co. v. Brown*, 82 Tex. 631; 18 S. W. Rep. 713.

<sup>257</sup> For the rule relating to other contracts, see Ewell's *Evans on Agency*, pp. 605-20, side pp. 466-80; *Du Souchet v. Dutcher* (Ind.), 15 N. E. Rep. 459 (annotated case); note, 52 Am. Dec. 57, 58; *Van Duzer v. Howe*, 21 N. Y. 531.

<sup>258</sup> See *Jones v. Dana*, 24 Barb. (N. Y.) 395, holding that where parties have been induced to enter into contracts of insurance, upon a

representations which are of facts material to the risk, and which are calculated to deceive or impose upon the applicant, and those which are mere expressions of opinion or recommendations upon which the insured has no right to rely;<sup>259</sup> although it is intimated that if such representations approach too closely to the border line of fraud, they may in cases of insurance vitiate the contract, especially in cases of fire and marine risks.<sup>260</sup> So fraudulent representations of the agent are a complete defense to assessments or an action on a premium

fraudulent representation by the agents or officers of the company in regard to its capital or pecuniary resources and ability, or any other matter which rightfully influenced them in the negotiation, they may be relieved against their contracts: *Farmers' F. Ins. Co. v. Marshall*, 29 Vt. 23, where it is held that parol representations or concealments affecting the risk will, in many cases, avoid a policy, when they would not have that effect, or perhaps be permitted to be shown in reference to a contract of a different character; *United States Life Ins. Co. v. Wright*, 33 Ohio St. 533, where a fraudulent representation by an agent of insurer to a person to induce application for insurance, that for a specified annual premium a policy would be fully paid at a given period and further entitle the holder to certain specified benefits, induced the person to apply for a policy and to pay the premium, it was held that the applicant may rescind the contract and recover back the premium, where the policy issued is materially different from what was represented; *Brown v. Donnell*, 49 Me. 421; 77 Am. Dec. 266, holding that if officers of a company hold it out as solvent, when by the exercise of due care and diligence they might know it was insolvent, there would be good reason for holding them guilty of fraud; *Thompson v. Phoenix Ins. Co.*, 75 Me. 55; 46 Am. Rep. 357, where insured was induced to settle for a loss, upon false representation of agent as to effect of nonoccupancy of the building; held not actionable if statements of law, though false, and if statement of fact and not of law, it was only expression of opinion, and did not sustain an action; *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264. It was here held that the neglect to pay a premium on a life policy would not work a forfeiture where the neglect was caused by representation of agent of insurer, though without authority, that it would be converted into a paid-up policy by the company, on the basis of the premiums already paid; *New Era Life Assn. v. Welgle*, 123 Pa. St. 577; 18 Atl. Rep. 393; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656, where insured was induced, by fraudulent representations of agent, to enter into contract; *Keller v. Equitable Fire Ins. Co.*, 23 Ind. 170; *Ellenberger v. Protection Mut. F. Ins. Co.*, 89 Pa. St. 464.

<sup>259</sup> *Simons v. New York L. Ins. Co.*, 38 Hun (N. Y.), 309.

<sup>260</sup> *Farmers' Mut. F. Ins. Co. v. Marshall*, 29 Vt. 23, per Redfield, C. J.

note,<sup>261</sup> especially where the agent's representations that the company was solvent and in good condition were made by the authority of the directors.<sup>262</sup> And like representations by a general agent to the local agent who repeats them to a third party, thereby inducing him to insure, may be set up in defense to an action on the premium note,<sup>263</sup> although it is held in another case that such representations are not admissible against the company where they were beyond the scope of the agent's authority, he being empowered only to receive and transmit applications to the company.<sup>264</sup> It is also held that intrusting an agent with blank forms for applications for insurance and also of premium notes, and giving him authority to receive applications, does not, of necessity, empower him to bind the company by declarations as to the amount of its capital.<sup>265</sup> So if the policy issued is materially different from what the agent represented it to be, the assured may rescind and recover back the premium paid;<sup>266</sup> and the assured may rescind where the agent misrepresents the solvency and financial condition of the company.<sup>267</sup> He may also rescind where he is induced to insure by the agent's false statements that certain persons had insured in the company, and he may, in such case, recover back the premium paid from the agent.<sup>268</sup> And if he is induced, by the fraud of an agent of a mutual company, to become a member, he is not obligated thereby.<sup>269</sup> So the agent's representations, in response to inquiries by the applicant as to the amount of capital stock paid in and invested, will bind the company, especially where the company's officers authorized such representations;<sup>270</sup> and, in case of a mutual company, its local agent may bind it by representations made in

<sup>261</sup> *Lycoming Ins. Co. v. Woodworth*, 83 Pa. St. 223.

<sup>262</sup> *Boland v. Whitman*, 33 Ins. 64.

<sup>263</sup> *Sunbury F. Ins. Co. v. Humble*, 100 Pa. St. 495.

<sup>264</sup> *Fogg v. Pew*, 10 Gray (Mass.), 409; 71 Am. Dec. 662.

<sup>265</sup> *Kelly v. Troy Fire Ins. Co.*, 3 Wis. 229, 241.

<sup>266</sup> *United Life Ins. Co. v. Wright*, 33 Ohio St. 533.

<sup>267</sup> *New Era Life Assn. v. Weigle*, 128 Pa. St. 577; 18 Atl. Rep. 393.

<sup>268</sup> *Hedden v. Griffin*, 136 Mass. 229; 49 Am. Rep. 25.

<sup>269</sup> *Brown v. Donnell*, 47 Wis. 421; 77 Am. Dec. 266; *Jones v. Dana*, 24 Barb. (N. Y.) 395.

<sup>270</sup> *Fogg v. Griffin*, 2 Allen (Mass.), 1.

response to inquiries regarding its financial standing and condition or otherwise.<sup>271</sup> But the agent's fraud in procuring the application is no defense to an action by the receiver of a company to recover assessments where the assured has slept on his rights for a long period, and the policy has been canceled, and the unearned premiums returned by the company and rights of innocent third parties, such as those of new members of mutual companies, has intervened;<sup>272</sup> nor does the rule apply where the assured has a fair opportunity to ascertain the truth, and he could easily have done so, as where he is given a pamphlet which he reads and which fully describes the plan of insurance.<sup>273</sup> So where plaintiff's agent falsely asserts that the "life clause," so called, was not contained in the policies issued by a certain company, and said agent left his blank form to compare with the other contract, and defendant was subsequently insured in plaintiff's company, it was held that he could not refuse to receive the policy, nor avoid his agreement to pay the pre-

<sup>271</sup> *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656.

<sup>272</sup> *Mansfield v. Cincinnati Ice Co.* (Ohio, 1892), 28 Week. L. Bull. 113; *Dettra v. Kestner*, 147 Pa. St. 566; 23 Atl. Rep. 889.

<sup>273</sup> The court in this case said: "It was the claim of the plaintiff's counsel on the argument of this appeal that this action was for fraud, and that the exclusion of the representations made by the agent of the defendant when he solicited the application was erroneous, because the fraud was then and there perpetrated by him in that subject. If, after that, the agent made representations respecting the authority of the agent to make representations was limited to statements made in writing and presented to the officers of the company in the application. And the plaintiff was made aware of this restriction because it is contained in the policy itself; more than that, the pamphlet containing a full and true description and representation of the tontine plan of insurance was read by the agent to the plaintiff, and there was no concealment or misrepresentation on that subject. If, after that, the agent made representations respecting the advantages of the plan over other systems and forms, they were quite immaterial, and amounted simply to recommendation and opinion. They had no tendency to deceive or mislead the plaintiff or her husband so long as the plan itself was explained to and understood by them. Commendation is not misrepresentation; even exaggeration differs widely from intentional falsehood. General assertions as to value or advantage cannot be made the basis of an action for deceit; an expression of opinion is not a representation of fact upon which a charge of fraud can be predicated": *Simons v. New York L. Ins. Co.*, 38 Hun, 309.

mium therefor, because of said false statement.<sup>274</sup> Nor is evidence admissible that the company's agent represented to the insured that he would be liable to only a five per cent assessment during any one year, and the application stipulated that the company would not be bound by any act or statement made to or by the agent restricting its rights, or varying its written or printed contract, unless inserted in the application in writing;<sup>275</sup> and unauthorized and false representations by an agent to receive applications for insurance, and the premium, for a mutual insurance company, as to the place where risks were taken, are not admissible as a defense to an action on a premium note to the company. And so of similar representations by the president of the corporation to the agent at the time of his appointment.<sup>276</sup> In an Illinois case the owner of a building occupied by a tenant was told by the company's agent, at the time of effecting insurance thereon, that it would not matter if the premises should become vacant. The policy, when issued, provided that it should be void if the building became vacant at any time. The insured had no knowledge of the condition, the agent having kept the policy in his possession until after the loss. It was held that the company having failed to notify the insured of the change, so that he might repudiate or ratify the contract, was liable under the actual contract as made with the agent, and which the insured had a right to suppose was the one contained in the policy.<sup>277</sup> And the assured has the right to assume, without examination, that a new policy given to him on continuing his insurance is substantially the same as the first one, where the soliciting agent told him he would so make it out, with the exception that it would be changed so that the company need only give a receipt in the future, instead of making a new policy.<sup>278</sup> So where an insurance agent, who procures an application, fraudulently conceals the fact that the policy contains a clause, under

<sup>274</sup> *American Steam B. Ins. Co. v. Wilder*, 39 Minn. 350; 40 N. W. Rep. 252.

<sup>275</sup> *Lycoming Fire Ins. Co. v. Langley*, 62 Md. 196.

<sup>276</sup> *Hackney v. Allegheny Mut. Ins. Co.*, 4 Pa. St. 183.

<sup>277</sup> *St. Paul F. Ins. Co. v. Wells*, 89 Ill. 82.

<sup>278</sup> *Burson v. Fire Assn.*, 136 Pa. St. 267; 20 Atl. Rep. 401; 26 Week. Not. Cas. 408.



which the insured could not cancel it, to take out insurance in other companies without forfeiting the premium, such clause does not bind the insured.<sup>279</sup> But it is held, however, that if an agent has power only to solicit applications, and not to issue policies, that his representations that mortgages would not invalidate the policy is not binding upon the company in the face of a condition in the policy that, in case the property was mortgaged without the written consent of the superintendent indorsed on the policy, the contract should be void.<sup>280</sup> And the same rule applies where the agent represented to the insured that the policy would not prevent his keeping gunpowder, which was not true.<sup>281</sup> So if a partner is induced by the representations of the agent to insure the firm property in his own name it is held that the whole firm interest is covered.<sup>282</sup>

**§ 515. Notice to and Knowledge of Agent—Generally.**

As a general rule, notice to an agent and knowledge obtained by him while acting within the scope of his authority is notice to the principal.<sup>283</sup> So an insurance company is estopped from asserting the invalidity of its policy at the time it was issued

<sup>279</sup> *Hartford Steam Boiler Inspect. & Ins. Co. v. Cartier*, 89 Mich. 41; 50 N. W. Rep. 747.

<sup>280</sup> *Smith v. Continental Ins. Co.*, 6 Dak. 433; 43 N. W. Rep. 810.

<sup>281</sup> *Western Assur. Co. v. Rector*, 85 Ky. 294; 3 S. W. Rep. 415.

<sup>282</sup> *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; 98 Am. Dec. 332; *Anson v. Winneshiek Ins. Co.*, 23 Iowa, 84. But see *Peoria Ins. Co. v. Hall*, 12 Mich. 202. See sec. 417, herein.

<sup>283</sup> Notice to president of company of prior insurance is notice to the company: *National Ins. Co. v. Crane*, 16 Md. 260; 77 Am. Dec. 289. Payment of debt to creditor's agent binds creditor with knowledge of debtor's insolvency, where creditor's agent had such notice: *Matthews v. Riggs*, 80 Me. 107; 5 N. Eng. Rep. 863. Where traveling agent who has authority to solicit insurances, make surveys and receive applications, receives notice of another insurance, such notice is binding upon the company, though it never reached it: *McEwen v. Montgomery Co. Mut. Ins. Co.*, 5 Hill (N. Y.), 101; *Sexton v. Montgomery etc. Ins. Co.*, 9 Barb. (N. Y.) 191. See, also, *Kaufman v. Rooley*, 60 Tex. 310; 48 Am. Rep. 266; *Fulton Bank v. New York & S. Canal Co.*, 4 Paige Ch. (N. Y.) 127; *Hoover v. Wise*, 91 U. S. 310; *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402; *Miller v. Mutual B. Ins. Co.*, 31 Iowa, 216; 7 Am. Rep. 122; *Norris v. La Neve*, 3 Atk. 26; *Port Jervis v. First Nat. Bank*, 96 N. Y. 559.

for the violation of any of the conditions of such policy if, at the time it was so issued, the fact of such violation was known to the company or its duly authorized agent.<sup>284</sup> Where the fact communicated to the agent has relation to or arises from the subject matter of the agency, the presumption exists that the agent has communicated such fact to his principal. This is true whether the agent actually does so communicate such fact or not. It also equally holds whether the agent's failure so to do arises from mere neglect or design, or whether the notice to the agent is actual or constructive. In cases of special or class agents, whose duty is to communicate certain facts to the directors or managing agents, notice to them of such facts is notice to the company.<sup>285</sup> So notice to a general agent with authority to issue the policy is notice to the company;<sup>286</sup> and where notice is required to be given the company under a condition in the policy, such condition is satisfied if the assured, by direction of the agent, mails a properly addressed and prepaid letter to the company stating the necessary facts;<sup>287</sup> for if no particular mode is specified, any notice, whether oral or in writing, is sufficient.<sup>288</sup> And the company may be held chargeable with notice of facts known to its agent's clerk the same as if known to the agent;<sup>289</sup> and notice to an agent of a life insurance com-

<sup>284</sup> *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524; 34 Am. St. Rep. 877. When knowledge of local officer of society as to prior bad health of assured is not chargeable to society: *Hause v. National Union*, 97 Mich. 513; 56 N. W. Rep. 834.

<sup>285</sup> See *N. E. F. & M. Ins. Co. v. Schettler*, 38 Ill. 171; *Massachusetts Life Ins. Co. v. Eschelman*, 30 Ohio St. 657, which holds that where a general agent, in the due prosecution of his business, appoints a subagent, notice coming to the subagent in the due course of his business is notice to the principal: *Jones v. Bamford*, 21 Iowa, 217; *Calais S. R. Co. v. Scudder*, 2 Black, 389; *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 309; *Scudder v. Calais S. B. Co.*, 1 Cliff. (C. C.) 381; *Sager v. Portsmouth S. & P. & E. R. Co.*, 31 Me. 228.

<sup>286</sup> *Combs v. Hannibal etc. Ins. Co.*, 43 Mo. 148; 97 Am. Dec. 383; *Ames v. New York Mut. Ins. Co.*, 14 N. Y. 253; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565.

<sup>287</sup> *Edwards v. Mississippi Valley Ins. Co.*, 1 Mo. App. 192.

<sup>288</sup> See *Carroll v. Charter Oak Ins. Co.*, 38 Barb. (N. Y.) 402; *Russell v. State Ins. Co.*, 55 Mo. 585; *McEwen v. Montgomery etc. Ins. Co.*, 5 Hill (N. Y.), 101.

<sup>289</sup> *Bennett v. Council Bluffs Ins. Co.*, 70 Iowa, 600.

pany, when procuring an application, is notice to the company where the agent is authorized to solicit, make out, and forward applications, deliver policies, and collect and transmit premiums.<sup>290</sup> So notice to local agents of a foreign company is notice to the company. Where the principal habitually deals through such agents with third parties, the latter have a right to assume that the former are authorized to receive from them material communications relating to the business they are transacting, unless they are notified to the contrary, providing that the agent is acting within the apparent scope of his authority;<sup>291</sup> but a notice to the company's agent while the policy is in force is held not a notice under a renewal receipt.<sup>292</sup> But notice of facts to or knowledge of one who acts as a general insurance broker on his own account, and who places the risk in such company as may accept it, does not bind the company in which the insurance is placed by him for another;<sup>293</sup> nor is notice to a broker to solicit applications notice to the company.<sup>294</sup> The knowledge of an agent authorized to issue policies may constitute knowledge of and estop the company, notwithstanding the policy provides that the agent may not waive its conditions,<sup>295</sup> and the agent's knowledge of the uses to which property is applied is that of the company where he resides near the premises and the assured lives in an adjoining state;<sup>296</sup> and the company is estopped where the agent knew that the insured buildings were not entirely situated on land of the assured's firm, and that there was a change in its membership.<sup>297</sup> So the rule that an agent's knowledge is that of the company has been applied to knowledge of the agent that the interest of the assured is not that of a fee;<sup>298</sup> where he knows that the insured is

<sup>290</sup> *Miller v. Mutual B. L. Ins. Co.*, 31 Iowa, 216; 7 Am. Rep. 122, and note, 128. See, also, preceding sections under this chapter; *McEwen v. Montgomery Ins. Co.*, 5 Hill (N. Y.), 101.

<sup>291</sup> *Keeler v. Niagara Ins. Co.*, 16 Wis. 523; 84 Am. Dec. 714.

<sup>292</sup> *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; 5 Am. Rep. 115.

<sup>293</sup> *Ben. Franklin Ins. Co. v. Weary*, 4 Ill. App. 74.

<sup>294</sup> *Devens v. Mechanics & Traders' Ins. Co.*, 83 N. Y. 163.

<sup>295</sup> *Gans v. St. Paul F. etc. Ins. Co.*, 43 Wis. 108; 28 Am. Rep. 535. See preceding sections under this chapter.

<sup>296</sup> *Springfield F. & M. Ins. Co. v. McLimans*, 28 Neb. 846; 45 N. W. Rep. 171.

<sup>297</sup> *German F. Ins. Co. v. Carrow*, 21 Ill. App. 631.

<sup>298</sup> *Berry v. American C. Ins. Co.*, 30 St. R. 53; 8 N. Y. Supp. 762.

not sole owner of the property;<sup>299</sup> when the agent of a mutual company knows that the insured is a confirmed drunkard when the certificate is issued;<sup>300</sup> where the agent knows at the time that an insurance was effected on a mill that it was used as a place of storage;<sup>301</sup> where he knows that the assured is applying for concurrent insurance and the amount applied for;<sup>302</sup> where he knows of the existence of an encumbrance on the land;<sup>303</sup> where the insured exhibits to the soliciting agent a paper showing the nature and extent of the encumbrances;<sup>304</sup> where insured informs the agent of the conditions on which title to property is held, even though the policy requires consent to be indorsed on the policy;<sup>305</sup> where the agent has knowledge as to the ownership of the premises and of litigation concerning it;<sup>306</sup> where he has knowledge, acquired at the issuance of a prior policy, of the interest of the assured;<sup>307</sup> and where the agent knows of the existence of material facts when issuing the policy, the company is estopped from alleging their nonexistence in defense of an action in the policy.<sup>308</sup> So delivery of plats of a building proposed to be insured to the company's agent is delivery to the principal.<sup>309</sup> And where a cargo was loaded in a manner customary with such vessels, and the agent was called to look at it, and said he thought it was all right, the company was held bound thereby.<sup>310</sup> So the company is chargeable with the agent's knowledge of the invalidity of certain policies where a person is induced by such agent to take out insurances on the lives of her sister and brother, and signs the policies her-

<sup>299</sup> *Mark v. National F. Ins. Co.*, 24 Hun (N. Y.), 505.

<sup>300</sup> *Newman v. Covenant M. B. Assn.*, 76 Iowa, 56; 40 N. W. Rep. 87.

<sup>301</sup> *Humphrey v. Hartford F. Ins. Co.*, 15 Blatchf. (C. C.) 504.

<sup>302</sup> *Hagan v. Merchants' & B. Ins. Co.*, 81 Iowa, 321; 46 N. W. Rep. 1114.

<sup>303</sup> *Breckenridge v. American Cent. Ins. Co.*, 87 Mo. 62.

<sup>304</sup> *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386; 8 S. Rep. 48.

<sup>305</sup> *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49; 43 N. Y. St. Rep. 400; 3 N. E. Rep. 254.

<sup>306</sup> *Western Assur. Co. v. Stoddard*, 88 Ala. 606; 7 S. Rep. 379.

<sup>307</sup> *Broadhead v. Lycoming F. Ins. Co.*, 23 Hun (N. Y.), 397.

<sup>308</sup> *Crescent Ins. Co. v. Camp*, 71 Tex. 503; 9 S. W. Rep. 473.

<sup>309</sup> *Moore v. Atlantic Mut. Ins. Co.*, 56 Mo. 343.

<sup>310</sup> *Allen v. St. Louis Ins. Co.*, 46 N. Y. Sup. Ct. 175.

self, and does not discover that they were void for several years, when she sues the company to recover the premiums paid, and in such case a recovery may be had.<sup>311</sup> So where an assistant district superintendent has knowledge that the assured is connected with the liquor business. Such knowledge acts as a waiver of a condition in the policy requiring a written permit therefor signed by the president or secretary.<sup>312</sup> But it is held that an agent's knowledge of the nature of the parties' interests, and of the right of the insuring member of the firm to insure the whole partnership interest, did not bind the company, only to the extent of the insuring partner's own interest, although the parties intended to insure the whole by a policy in such partner's name.<sup>313</sup> And the fact that an agent, a few months before taking the application, knew that applicant was foreclosing a mortgage, does not imply that he knew the applicant's only interest, when he took the risk, was under a sheriff's certificate of foreclosure sale;<sup>314</sup> nor does information to the agent that the property was held under a contract of sale by a bank estop the company where an individual, and not the bank, held the legal title;<sup>315</sup> nor is the company responsible beyond the value of the vessel for the negligence of its wrecking master by reason of the knowledge of such agent.<sup>316</sup> And it is held in Kentucky<sup>317</sup> that notice to the agent that the assured

<sup>311</sup> *Fulton v. Metropolitan Life Ins. Co.*, 19 N. Y. Supp. 660.

<sup>312</sup> *McGurk v. Metropolitan Life Ins. Co.*, 56 Conn. 528; 1 L. R. Annot. 563.

<sup>313</sup> *Peoria Ins. Co. v. Hall*, 12 Mich. 202. The court said in this case: "We do not see how the agent's knowledge of the interest of the parties, nor his belief or assurance that Hall had the right to insure the whole, can affect the question, so long as the insurance was not in fact made on the account and for the benefit of the firm. One partner cannot, by reason alone of his interest as such, insure in his own name and for his own benefit the interest of his copartner in the partnership stock. And though such may have been the intention both of the insured and of the company on entering into the contract, the policy, in legal effect, can operate only as an indemnity against loss to the extent of the plaintiff's undivided half of the goods": *Examine Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213, 222. And see sec. 546 herein.

<sup>314</sup> *Stennett v. Pennsylvania F. Ins. Co.*, 68 Iowa, 674.

<sup>315</sup> *Carpenter v. German-American Ins. Co.*, 59 Hun (N. Y.), 249.

<sup>316</sup> *Craig v. Continental Ins. Co.*, 26 Fed. Rep. 708.

<sup>317</sup> *Galbraith v. Arlington Mut. L. Ins. Co.*, 12 Bush (Ky.), 29.

was afflicted with a dangerous disease did not estop the company. So it is declared that notice to an agent, whose authority is limited to taking applications and delivering policies does not bind the company.<sup>318</sup>

**§ 516. Presumption as to Agent's Knowledge.**—Where an agent represents a fire insurance company, it is held that a presumption attaches that he is familiar with the construction of the building insured, with the description thereof, its divisions, as well as of its manner of use, and that the company is bound by such presumed knowledge of the agent.<sup>319</sup>

**§ 517. Reformation of Policy to Conform with Actual Contract.**—So a policy will be reformed to express the actual contract made with the agent in obtaining the insurance, although such contract differs from the expressed terms of the policy, and notwithstanding it is provided that agents have no authority to make, alter, or discharge contracts.<sup>320</sup>

<sup>318</sup> *Alexander v. Germania F. Ins. Co.*, 66 N. Y. 464; 23 Am. Rep. 76. See *Residence F. Ins. Co. v. Hannawald*, 37 Mich. 103; 2 W. Ins. Rev. 88; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402. See, also, preceding sections under this chapter.

<sup>319</sup> *Pettet v. State Ins. Co.*, 41 Minn. 299; 43 N. W. Rep. 378.

<sup>320</sup> *Metropolitan Life Ins. Co. v. Wood* (Ohio, 1895), 33 Week. L. Bull. 346. See *Frank v. Pacific Mut. L. of Cal.*, 44 Neb. 320; 62 N. W. Rep. 454; 24 Ins. L. J. 538; *Mutual B. L. Ins. Co. v. Robinson* (U. S. C. C. A. 1894), 58 Fed. Rep. 723; 7 U. S. C. C. A. 444.

## CHAPTER XX.

### AGENTS OF INSURER—POWERS—THE POLICY.

- § 525. Agent: Power to make oral contract.
- § 526. Power of agent to accept risks and make contracts.
- § 527. When contract of agent is personal.
- § 528. Power of agent to subscribe policy.
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- § 565. Agent's authority: Vacant—Unoccupied—Waiver.
- § 566. Agent's authority: When no waiver.
- § 567. Agent's authority: Cancellation.
- § 568. Agent's authority: Removal of property.

§ 525. **Agent—Power to Make Oral Contract.**—As we have stated in a preceding chapter,<sup>1</sup> the company may be bound by an oral contract of insurance or an oral agreement to insure, so an agent intrusted with blank policies, signed by the president and secretary, with authority to negotiate, fill up, and issue the same, may bind the company by a parol contract to insure,<sup>2</sup> and an agent authorized to make the necessary surveys, and negotiate and conclude all the terms of the contract, and to fill up and countersign the policy, may bind the company by a parol contract to issue a policy.<sup>3</sup> So an unrestricted authority to negotiate a contract of insurance by issuing a policy includes authority to make a valid preliminary contract for such insurance.<sup>4</sup> And an agent with authority to survey risks, fix the rate of premium, issue policies, and effect insurance may make a valid oral contract of insurance.<sup>5</sup> And a local agent of a foreign company, with similar authority, may bind the company by parol to contracts of original or renewal insurance.<sup>6</sup> So an agent authorized to bind the company pending correspondence concerning the policy may make a valid parol contract to insure.<sup>7</sup> A general agent may bind the company by an oral agreement that an open policy may cover other prop-

<sup>1</sup> Chapter III, herein.

<sup>2</sup> *Hotchkiss v. Germania F. Ins. Co.*, 5 Hun (N. Y.), 9; *Angell v. Hartford F. Ins. Co.*, 59 N. Y. 171; 17 Am. Rep. 322.

<sup>3</sup> *Ellis v. Albany City F. Ins. Co.*, 50 N. Y. 402; 10 Am. Rep. 495, and note, 502.

<sup>4</sup> *Humphrey v. Hartford F. Ins. Co.*, 15 Blatchf. (C. C.) 504.

<sup>5</sup> *Sanborn v. Fire Ins. Co.*, 16 Gray (Mass.), 448; 77 Am. Dec. 419.

<sup>6</sup> *Banble v. Aetna Ins. Co.*, 2 Dill. 156; *Taylor v. Germania Ins. Co.*, 2 Dill. (C. C.) 282.

<sup>7</sup> *Fish v. Cottinett*, 44 N. Y. 538.



erty than that already embraced therein, where the property covered is of a changeable and substantially the same character as that insured originally.<sup>8</sup> So the principal clerk of an insurance company, with authority to receive applications, fill policies and renewals, and to generally attend to the office business, has power to bind the company by a parol contract of insurance;<sup>9</sup> and an agent may bind the company by a parol agreement extending the time of payment of the premium, although the policy prohibits such waiver by any agent of the company.<sup>10</sup> But it is held that a soliciting agent authorized to receive applications and to forward the same to the company for approval or rejection, and to collect and transmit premiums, has no authority to make an oral contract to insure, even though he had told the insured, on a prior occasion, that the insurance would take effect from the time of the application, and a policy had been issued on that application.<sup>11</sup> No presumption exists, however, that the company's agents have authority to make a parol contract to insure; such authority must be proved affirmatively.<sup>12</sup>

**§ 526. Power of Agent to Accept Risks and Make Contracts.**—An agent of an insurance company has power to take risks upon property outside of the locality for which he was appointed, especially where the general agent receives the policy and accepts the risk;<sup>13</sup> and a risk accepted by him upon property which the company has prohibited him from insuring will be valid, provided the insured has no knowledge of the inhibition,<sup>14</sup> and, in general, where he has author-

<sup>8</sup> *Kennebec Co. v. Augusta Ins. etc. Co.*, 6 Gray (Mass.), 204.

<sup>9</sup> *Cooke v. Aetna Ins. Co.*, 7 Daly (N. Y.), 555.

<sup>10</sup> *Young v. Hartford F. Ins. Co.*, 45 Iowa, 377; 24 Am. Rep. 784.

<sup>11</sup> *Morse v. St. Paul F. & M. Ins. Co.*, 21 Minn. 407; 5 Ins. L. J. 409; *Winneshiek Ins. Co. v. Holzgrafe*, 53 Ill. 516; 5 Am. Rep. 64.

<sup>12</sup> *Aetna Ins. Co. v. Northwestern Iron Co.*, 21 Wis. 458. See this case as to where declarations are insufficient to prove such authority.

<sup>13</sup> *Aetna Ins. Co. v. Maguire*, 51 Ill. 342. See, also, *Lightbody v. North America Ins. Co.*, 23 Wend. (N. Y.) 18.

<sup>14</sup> *Gloucester Mfg. Co. v. Howard Ins. Co.*, 5 Gray (Mass.), 497; 66 Am. Dec. 376.

ity to exercise discretion in relation to the issuance of policies, and the risk is a legal one, and one which the company itself has the power to accept, the latter is bound by all risks under policies issued by such agent, upon the familiar principle that an agent's acts within the scope of his real or apparent authority bind the principal;<sup>15</sup> although it is held that a general authority to take risks does not necessarily include authority to take a risk on a blacksmith-shop.<sup>16</sup> And an agent with power only to solicit risks and receive applications has no power to accept them, nor agree that the risk attach at a certain time,<sup>17</sup> or at the date of the application.<sup>18</sup> So an agent authorized to receive applications for insurance in accordance with instructions from the company, and to forward the same to the company for approval, and to collect and transmit premiums, is a soliciting agent, and as such has no authority to make a contract of insurance;<sup>19</sup> nor can an agent contract without the approval of the directors where his authority to issue certificates is given subject to such approval.<sup>20</sup> So an agent with general powers cannot validly agree to receive a less premium than that fixed by the policy;<sup>21</sup> nor can an agent with authority to issue policies in one company, but not in another without the insured's consent, rescind a contract on the former company and place the risk in the latter. In such case the former contract holds, and the latter company is not bound.<sup>22</sup> But a risk accepted by a local agent cannot be rejected without no-

<sup>15</sup> See *Lighthody v. North America Ins. Co.*, 23 Wend. (N. Y.) 18.

<sup>16</sup> *Smith v. State Ins. Co.*, 58 Iowa, 487.

<sup>17</sup> *Stockton v. Fireman's Ins. Co.*, 33 La. Ann. 577; 39 Am. Rep. 277. See *Dickinson v. Mississippi etc. Ins. Co.*, 41 Iowa, 296.

<sup>18</sup> *Winnesheik Ins. Co. v. Holzgrafe*, 53 Ill. 516; 5 Am. Rep. 64. See *Todd v. Piedmont Ins. Co.*, 34 La. Ann. 63; *Dencens v. Merchants' etc. Ins. Co.*, 83 N. Y. 168.

<sup>19</sup> *Morse v. St. Paul F. & M. Ins. Co.*, 21 Minn. 407; 5 Ins. L. J. 409; *Armstrong v. State Ins. Co.*, 61 Iowa, 212. See, also, *Chase v. Hamilton Mut. Ins. Co.*, 22 Barb. (N. Y.) 527; *Bartholomew v. Merchants' F. Ins. Co.*, 25 Iowa, 507; 96 Am. Dec. 65.

<sup>20</sup> *Insurance Co. v. Johnson*, 23 Pa. St. 72.

<sup>21</sup> *Brown v. Massachusetts L. Ins. Co.*, 59 N. H. 298; 47 Am. Rep. 205.

<sup>22</sup> *Massasoit Steam Mills Co. v. Western Assur Co.*, 125 Mass. 110.

tice to the assured.<sup>23</sup> Where an agent to contract life assurances was to signify his acceptance of all risks by a memorandum signed by him and the company's medical officer, and the memorandum was signed by the medical officer and subagent, it was held that the contract was that of the agent.<sup>24</sup>

**§ 527. Where Contract of Agent is Personal.**—Where an insurance company has ceased to do business, and an agent pretends to act for it, he cannot bind his claimed principal by a contract of insurance, although he may bind himself.<sup>25</sup> In Pennsylvania, the statute provides that policies of insurance against loss by fire or lightning will be void, unless authority to issue or execute the same be expressly conferred by charter of incorporation. Under this statute an agent's contract to place certain insurance for an applicant against loss by fire, to take effect at a certain time, but which did not specify the company in which it was to be insured, was held to be a personal contract, and void.<sup>26</sup>

**§ 528. Power of Agent to Subscribe Policy.**—A contract of insurance may be subscribed by the underwriter or by his duly authorized agent or attorney. In England, the underwriter's agent may subscribe the policy, either by virtue of a custom on his part so to do, acquiesced in by the principal, or by the authority conferred under a power of attorney, or where the principal has held him out to the world as authorized to perform such act.<sup>27</sup>

**§ 529. Power of Agent to Execute Retroactive Policy.**  
A member of a mutual insurance company with a power to

<sup>23</sup> *Commercial Union Assur. Co. v. State*, 113 Ind. 331; 15 N. E. Rep. 518.

<sup>24</sup> *Rossiter v. Trafalgar L. Assur. Assn.*, 27 Beav. 377.

<sup>25</sup> *Montross v. Roger Williams Ins. Co.*, 49 Mich. 477.

<sup>26</sup> *Arrott v. Walker*, 118 Pa. St. 240; 12 Atl. Rep. 280; 10 Cent. Rep. 608.

<sup>27</sup> *Haughton v. Ewbank*, 4 Camp. 88; *Neale v. Euring*, 1 Esp. 61. See *Courteen v. Touse*, 1 Camp. 43, note a; 1 *Arnould on Insurance* Perkins' ed., 38; 2 *Phillips on Insurance*, 3d ed., secs. 1872, 2016, 2114; 1 *Duer on Insurance*, ed. 1845, sec. 8, p. 65.

sign policies, subject to a rule that the risk should attach from the day of acceptance by the principal, may execute a policy which is retrospective, containing the words "lost or not lost," where the policy has conformed to the rule above given, notwithstanding both parties, assured and agent, knew that two average losses had happened to the ship at the time of the execution of the policy.<sup>28</sup>

§ 530. **Countersigning Policy by Agent.**—Where the insurer is a corporation or association, the policy or certificate is required to be attested by certain designated officers or agents in accordance with the charter or by-laws,<sup>29</sup> and the policy may provide in express terms for the countersignature of the agent, which may be made a condition precedent to the validity of the policy or attachment of the risk, in which case there must be a compliance with such condition to entitle the assured to a recovery, unless a waiver can be shown,<sup>30</sup> even though the agent himself is the party insured, and the policy has been received and retained by him.<sup>31</sup> And a policy is only completely executed when duly attested by the signatures of the proper officers and countersigned by the agent.<sup>32</sup> So where there was a condition that the policy should be void in case of prior or subsequent insurance without written consent thereon, an unsigned consent of the general agent was held to be invalid in the absence of proof of authority to bind the company in such manner, or unless the company had in some way ratified the act.<sup>33</sup> But where a policy of insurance has been signed by the president and secretary of an insurance company, a contract written across the face of it, by which a deviation from

<sup>28</sup> *Mead v. Davison*, 3 Ad. & E. 313.

<sup>29</sup> *In re County L. Assur. Co.*, 1, R. 5 Ch. App. 283; *Perry v. Newcastle F. Ins. Co.*, 8 U. C. Q. B. 363.

<sup>30</sup> *Hardie v. St. Louis Mut. L. Ins. Co.*, 26 La. Ann. 242; *Prall v. Mutual Prot. L. Ins. Co.*, 5 Daly (N. Y.), 298; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400.

<sup>31</sup> *Badger v. American Popular L. Ins. Co.*, 103 Mass. 244; 4 Am. Rep. 547. But see *Norton v. Phoenix etc. Ins. Co.*, 36 Conn. 503; 4 Am. Rep. 98, noted hereafter in this section.

<sup>32</sup> *Peoria etc. Ins. Co. v. Walser*, 22 Ind. 73.

<sup>33</sup> *Security Ins. Co. v. Fay*, 22 Mich. 467; 7 Am. Rep. 670.

the voyage insured is healed, need not be re-signed by them in order to make such contract binding on the company, where it has been the uniform practice for the president to waive deviations in that manner.<sup>34</sup> In case the contract is to be completed and take effect only by a delivery of the policy when countersigned by the agent, and it is neither countersigned nor delivered, there is no contract, even though the premium note has been given to the agent; the agent having only authority to receive applications and collect premiums.<sup>35</sup> But the requirement by statute or charter, or otherwise, of the countersignature of an agent does not prevent making a valid agreement to deliver a policy.<sup>36</sup> The rule, however, requiring the signatures of the president and secretary, when provided for by the charter or by-laws, does not prevent making a valid oral contract to issue a policy or to insure or to renew an insurance, as has been stated in a prior chapter,<sup>37</sup> and this is true as to a countersignature by the agent, even though the policies and certificates of renewal issued by the company declare that they shall not be valid unless countersigned by the agent,<sup>38</sup> for such provisions may be dispensed with where the intention to execute is sufficiently plain.<sup>39</sup> The countersigning being an evidence of delivery, it seems that a delivery by letter would be equivalent.<sup>40</sup> So although it is expressly stated on the renewals issued by a life insurance company, and signed by its secretary, that in order to be valid they must be countersigned by the local agent, they are still presumptive evidence of payment where the policy is on the agent's own life, although not countersigned by himself. It is immaterial in such a case whether he countersigned them or not.<sup>41</sup> And where the charter does not require a countersignature, a policy contain-

<sup>34</sup> *Warren v. Ocean Ins. Co.*, 16 Me. 439; 33 Am. Dec. 674.

<sup>35</sup> *McCully v. Phoenix Mut. L. Ins. Co.*, 18 W. Va. 782.

<sup>36</sup> *Walker v. Mutual Ins. Co.*, 56 Me. 371.

<sup>37</sup> See Chap III, herein.

<sup>38</sup> *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351.

<sup>39</sup> *Kantrener v. Penn Mut. L. Ins. Co.*, 5 Mo. App. 581; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143.

<sup>40</sup> *Myers v. Keystone etc. Ins. Co.*, 27 Pa. St. 268; 67 Am. Dec. 463.

<sup>41</sup> *Norton v. Phoenix etc. Ins. Co.*, 36 Conn. 503; 4 Am. Rep. 98. But see cases at beginning of this section.

ing a blank form for the countersignature of the agent need not necessarily be filled out by the agent, as the policy may be valid when delivered without.<sup>42</sup> So a new benefit certificate issued to change the beneficiary, upon application made in accordance with the by-laws of the union, and signed by the supreme president and secretary of the union, and sealed with the seal of the supreme union, is not invalid because not signed and sealed by the officers of the subordinate union.<sup>43</sup> And where the premium is paid and the policy delivered to the assured as a completed contract, the company is estopped to say that it was not countersigned by the agent, although the policy provided for such countersignature. The provision is a formality which the company may dispense with, and it will in such case be presumed to have so done.<sup>44</sup> So an agent may accept a premium, though the receipt is not to be effectual until countersigned by him.<sup>45</sup> But the agent's countersignature is not waived by delivery of the policy without such signature by an unauthorized party, although he signs for the agent.<sup>46</sup>

§ 531. **Where Subagent Signs for Agent.**—Inasmuch as an agent may delegate his authority where he is expressly empowered to appoint subagents, or in matters which do not involve the exercise of skill and discretion,<sup>47</sup> it would seem that such subagent could validly countersign policies for the agent, especially where the act is done with his full acquiescence, and he delivers the policy.<sup>48</sup>

§ 532. **Signature of Assured—Waiver by Agent.**—The term "underwriter" arose from the custom to underwrite, or

<sup>42</sup> *O'Donnell v. Confederation L. Ins. Co.*, 2 Russ & Geld. (Nov. Sco.) 231.

<sup>43</sup> *Fisk v. Equitable Aid Union* (Pa.), 11 A. 84.

<sup>44</sup> *German F. Ins. Co. v. Laggart*, 47 Kan. 663; 28 Pac. Rep. 718; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Chapman v. Delaware M. Ins. Co.*, 23 N. B. R. 121.

<sup>45</sup> *Carroll v. Charter Oak Ins. Co.*, 1 Abb. Dec. (N. Y.) 316; 40 Barb. (N. Y.) 292.

<sup>46</sup> *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400.

<sup>47</sup> See sec. 395, *herein*.

<sup>48</sup> *Grady v. American Cent. Ins. Co.*, 60 Mo. 116, 123. But see cases under sec. 395, *herein*.

subscribe, the policy by the insurers, and they only subscribed the policy;<sup>49</sup> and although the policy is subscribed only by the insurer, it evidences the contract between both parties, and binds them to the performance of its conditions, and it is valid so long as the conditions are complied with.<sup>50</sup> But where a certificate of membership is required to be signed by the applicant, as a condition precedent to its validity, the company's agent may consent that the husband may sign for his wife where he makes the application for her in her absence, and the company is bound thereby where the wife subsequently ratifies her husband's act;<sup>51</sup> and the policy is not rendered void, for want of consideration, by the omission to sign the premium note where it is the custom of the company to dispense with such signature until after the policy is recorded.<sup>52</sup>

§ 533. **Estoppel by Acts of Agent—Generally.**—An estoppel may arise from the representations of the party where they relate to matters of fact which exist at the time, or which relate to a past state of things. The doctrine of estoppel also applies to representations which would otherwise operate as a fraud upon one who has been induced to rely upon them, or where one has been designedly induced by another to change his conduct or alter his condition in reliance upon such representations, or to abandon existing rights and representations as to future conduct; it will operate as an estoppel where made to influence others, and by which they have been induced to act, and which relate to an intended abandonment of existing rights.<sup>53</sup> So the company is estopped to deny the right of an agent to do acts which are within the scope of his authority, where the violation of the conditions of the contract is brought about by the agent's acts.<sup>54</sup> And the company must also bear a loss sustained by the misconduct or disobedience of its agent

<sup>49</sup> 1 Arnould on Marine Insurance, Perkins' ed. 1850, 37; 1 Id., Mac-lachlan's ed. 1887, 248.

<sup>50</sup> *Velle v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83.

<sup>51</sup> *Somers v. Kansas Prot. Union*, 42 Kan. 619; 22 Pac. Rep. 702.

<sup>52</sup> *Warren v. Ocean Ins. Co.*, 16 Me. 439; 33 Am. Dec. 674.

<sup>53</sup> *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544, per Field, J.

<sup>54</sup> *Messelback v. Norman*, 122 N. Y. 583, per the court.

acting within the scope of his authority, rather than the insured, who has dealt fairly with him without notice.<sup>55</sup> So where a certain state of facts exists, of which the agent, acting within the apparent scope of his authority, has knowledge at the time he was so acting, such knowledge will act as a waiver of conditions inconsistent with such facts, or will estop the company from availing itself of the inconsistent conditions, provided the assured is without notice of the agent's want of authority to waive, and there is no fraud or collusion.<sup>56</sup> So if one claims authority to represent the company as its agent in negotiating the contract, and forwards an application signed by him as agent, and the company issues a policy, and the premium is paid, the company is estopped to deny the agency, and is bound by the policy, even though the policy is altered by the agent without the knowledge of the assured, and although the agent forged the papers in the application.<sup>57</sup> So where an agent authorized to make contracts and issue policies verbally agrees with the assignee of the contract that the assigned policy shall be of the same force as a new policy, it estops the company, although the assignee, without the company's knowledge, had purchased the insured premises and satisfied a mortgage thereon.<sup>58</sup> So the court in *Insurance Company v. Wilkinson*,<sup>59</sup> referring to the claim of the insured that the agent had inquired about the facts and was fully informed concerning the same, says: "It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels in pais. The principle is, that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not, in

<sup>55</sup> *Commercial etc. Co. v. State*, 113 Ind. 331.

<sup>56</sup> See *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; 9 Am. Rep. 479; *Winans v. Insurance Co.*, 39 Wis. 342; *Hartford L. etc. Ins. Co. v. Hayden*, 90 Ky. 39; 13 S. W. Rep. 585; *Aetna Ins. Co. v. Maguire*, 51 Ill. 342; *Masters v. Madison etc. Ins. Co.*, 11 Barb. (N. Y.) 624. See also, cases under the preceding chapter.

<sup>57</sup> *McArthur v. Home L. Assn.*, 73 Iowa, 336; 35 N. W. Rep. 430.

<sup>58</sup> *Amazon Ins. Co. v. Wall*, 31 Ohio St. 623; 27 Am. Rep. 533.

<sup>59</sup> 13 Wall. (U. S.) 222, Miller, J.



a court of justice, be permitted to avail himself of that advantage."

**§ 534. Waiver and Estoppel by Agent—Conditions Precedent and Subsequent.**—Conditions may be precedent and relate to facts actually existing and which must be performed. Otherwise the formation of a valid contract is prevented, unless there be a waiver or an estoppel; or conditions may be subsequent, a breach of which may occur after a valid contract is completed. The former class is illustrated by the case where a building stands on leased ground, which fact is required to be stated or waived, or the contract under the provisions of the policy, will be void.<sup>60</sup> The latter class is illustrated by a case where the property is insured and the policy delivered, but the state of facts then existing is thereafter changed. As in case of occupancy of the building when insured, and there is a breach of condition by the premises becoming vacant thereafter.<sup>61</sup> And, as has been stated in the last section, there may be an estoppel by representations as to future conduct by which a party has been induced to act, and which relate to an abandonment of existing rights.<sup>62</sup> These rules are further illustrated by the following cases: Thus, the use of kerosene does not avoid the policy, notwithstanding a condition that it shall so operate, where the agent, at the time of the application, inspected the premises and saw and was informed that kerosene was used for lighting them;<sup>63</sup> and where the agent knew that the factory insured was to be run at night and lighted by an oil, which was a product of petroleum, the condition was held to be waived.<sup>64</sup> But where at the time the insurance was effected the agent knew that one barrel of petroleum was kept for lighting purposes, and the insured continued afterward to keep that amount, it was held that the policy was avoided, although it was also decided that the condition as to keeping

<sup>60</sup> *Van Scholeck v. Niagara F. Ins. Co.*, 68 N. Y. 434.

<sup>61</sup> *Wustum v. City F. Ins. Co.*, 15 Wis. 138.

<sup>62</sup> See *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544, per Field, J.

<sup>63</sup> *Bennett v. North British Ins. Co.*, 81 N. Y. 273; 37 Am. Rep. 501.

<sup>64</sup> *Couch v. Rochester German F. Ins. Co.*, 25 Hun (N. Y.), 499.

petroleum did not apply to that used for lighting purposes;<sup>65</sup> although if the condition of the premises when the loss occurs is the same as when insured, and the agent knew of the condition at that time, the policy covers the loss.<sup>66</sup> So where an insured distillery always had been and continued to be run at night, of which fact the agent who delivered the policy had knowledge, there is a waiver.<sup>67</sup> And knowledge of the agent that certain prohibited articles were, and were to be, used on the premises is knowledge of the company, and there is a waiver of the prohibitory condition.<sup>68</sup> So a condition against keeping gunpowder without written permission in the policy is waived where the agent knew it was kept and was to be kept;<sup>69</sup> although directly the contrary has been held in Kentucky.<sup>70</sup> So the knowledge of the agent that the insured had kept fireworks in another store does not operate as a waiver of a clause in the policy prohibiting the keeping of fireworks on the insured premises.<sup>71</sup> It is also held that where the guaranty relates to future conduct, and is not a part of the form of the contract, that the agent's knowledge of prior conduct does not affect a promise to do differently thereafter, and does not affect the company, as in case of keeping a watchman in the future, the representation or warranty being promissory in such case.<sup>72</sup> Such a state of facts is distinguished by the court in a New York case<sup>73</sup> from that where the agent knew, at the time of insuring, of the existence of facts which then constituted a ground of forfeiture.

**§ 535. What Agents may Waive Conditions—Knowledge Before and after Contract Made.—Where the agents**

<sup>65</sup> *Birmingham F. Ins. Co. v. Kroegher*, 83 Pa. St. 64; 24 Am. Rep. 147, and note, 150.

<sup>66</sup> *Norwich F. Ins. Co. v. Broomer*, 52 Ill. 442; 4 Am. Rep. 618.

<sup>67</sup> *American Cent. Ins. Co. v. McCrea*, 8 Lea (Tenn.), 513.

<sup>68</sup> *Rivara v. Queens Ins. Co.*, 62 Miss. 720.

<sup>69</sup> *Peoria Ins. Co. v. Hall*, 12 Mich. 202.

<sup>70</sup> *Western Assur. Co. v. Rector*, 85 Ky. 294; 3 S. W. Rep. 415. But see *Kenton Ins. Co. v. Downs*, 90 Ky. 236; 13 S. W. Rep. 882.

<sup>71</sup> *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366.

<sup>72</sup> *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; 86 Am. Dec. 362.

<sup>73</sup> *Van Scholck v. Niagara F. Ins. Co.*, 68 St. R. 434, 442.

are general agents, with authority to make contracts without reference to the home office, their power to waive conditions is coextensive with that of the principal.<sup>74</sup> Where the general agent, at the request of the local agent, consents to a waiver of a condition in the policy, the company is bound thereby, even though the local agent fails to communicate material facts known to him to the general agent.<sup>75</sup> So the agent of a fire insurance company is held to have authority to waive the conditions of a policy.<sup>76</sup> So an agent to issue policies and receive premiums may waive a condition requiring books, etc., to be kept in a fire-proof safe;<sup>77</sup> and an agent empowered to take insurance, deliver policies, collect premiums, sign the policy in his own name, and attach additional or other printed provisions thereto may bind the company by a waiver of the conditions in such attached slip.<sup>78</sup> So where a commissioned agent employs another to assist in obtaining risks, making surveys, collecting premiums, and delivering policies, accepting his acts, such subagent may waive conditions of a policy delivered by him.<sup>79</sup> An agent's power is, however, frequently terminated when the negotiations are completed, as in case he only has power to receive applications, make surveys, remit to the general agent, receive the policy, if granted, and collect the premium.<sup>80</sup> So that an agent authorized to receive applications and premiums has no power to make or vary contracts of insurance;<sup>81</sup> and notice to the soliciting agent that the ap-

<sup>74</sup> *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49; 43 St. R. 400; 30 N. E. Rep. 254. But see *Mentz v. Lancaster F. Ins. Co.*, 79 Pa. St. 475. That agent of benevolent society employed to solicit insurance has power to waive conditions not relating to by-laws, see *Supreme Council of Catholic B. Leg. v. Boyle*, 10 Ind. App. 301; 37 N. E. Rep. 1105.

<sup>75</sup> *Keeler v. Niagara Ins. Co.*, 16 Wis. 523; 84 Am. Dec. 714.

<sup>76</sup> *Alexander v. Continental Ins. Co.*, 67 Wis. 422; 30 N. W. Rep. 727.

<sup>77</sup> *Niagara etc. Ins. Co. v. Brown*, 123 Ill. 356; 15 N. E. Rep. 166.

<sup>78</sup> *Niagara F. Ins. Co. v. Brown*, 123 Ill. 356; 12 West. Rep. 815.

<sup>79</sup> *Davis v. Lamar Ins. Co.*, 18 Hun (N. Y.), 230.

<sup>80</sup> *Healy v. Imperial F. Ins. Co.*, 5 Nev. 268. See *Willson v. Genesee Mut. Ins. Co.*, 14 N. Y. 418.

<sup>81</sup> *Putnam etc. Co. v. Fitchburg etc. Co.*, 145 Mass. 265, 269; 13 N. E. Rep. 902; 5 N. Eng. Rep. 288.

plicant keeps gunpowder in the insured premises is held not to be notice to the company.<sup>82</sup> Nor is there any waiver where the agent only has authority to take applications and deliver them, and the knowledge of the facts constituting a breach comes to him after the contract is completed;<sup>83</sup> nor is there a waiver of forfeiture by the agent's acts in assisting to make a mortgage ten months after the insurance is effected,<sup>84</sup> and the company is not chargeable with notice acquired by the soliciting agent subsequently to the delivery of the policy, for the reason that his functions are held to have ceased.<sup>85</sup> Thus, where such agent obtains knowledge after the issue of a policy of the sinking of a well, and a gas jet is struck in so doing, which ignites and destroys the property, the company is not chargeable with the agent's knowledge.<sup>86</sup> In all of the above and similar cases, however, the question must be determined by the rules: 1. Whether the agent was acting within the scope of his apparent authority; 2. Whether the insured had knowledge or was bound to have knowledge, of the limitations upon and extent of the agent's authority; 3. Whether such acts of waiver have been ratified; 4. Whether they are sanctioned by custom.<sup>87</sup> And it would be competent to show an actual express power to waive conditions, or an implied authorization so to do, arising from the acts of the company, or from what he has previously done with the knowledge and consent of the principal.<sup>88</sup>

**§ 536. Waiver of Forfeitures by Agent—Generally.** It is held in California<sup>89</sup> that the assured is justified in assuming that the company's agents have the right to waive forfei-

<sup>82</sup> *Liverpool & London etc. Ins. Co. v. Van Orr*, 63 Miss. 431.

<sup>83</sup> *Sun Mut. Ins. Co. v. Texarkana etc. Co.* (Tex.), 15 S. W. Rep. 34.

<sup>84</sup> *Stevens v. Queens Ins. Co.*, 81 Wis. 335; 55 N. W. Rep. 553.

<sup>85</sup> *Crane v. City F. Ins. Co.*, 3 Fed. Rep. 558; *Heath v. Springfield F. & M. Ins. Co.*, 58 N. H. 414; *Putnam Tool Co. v. Fitchburg Mut. F. Ins. Co.*, 145 Mass. 265; 13 N. E. Rep. 902; 5 N. Eng. Rep. 288.

<sup>86</sup> *Crane v. City Ins. Co.*, 3 Fed. Rep. 558.

<sup>87</sup> *New England F. & M. Ins. Co. v. Schettler*, 33 Ill. 166.

<sup>88</sup> See *Sohnes v. Insurance Co. of North America*, 121 Mass. 438, 441.

<sup>89</sup> *Silverberg v. Phoenix Ins. Co.*, 67 Cal. 36.

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tures, unless the policy otherwise provides. And where the agent makes statements not intended to warrant the assured in doing an act which constitutes a breach of conditions, in consequence of which a forfeiture arises, there is no waiver nor estoppel.<sup>90</sup> So it is held that a mutual company may by its agent waive a forfeiture if the agent acts within the scope of his authority and with full knowledge of the facts.<sup>91</sup> In general, it may be stated that it is conceded that a general agent may, in the absence of known limitations on his authority, waive a forfeiture as well as the company.<sup>92</sup>

**§ 537. Power of Agent to Bind Company by Construction of Policy.**—Where a foreign insurance company has no general agent in the state, but employs a local agent to represent it, such local agent may bind the company by his answer to a policy holder when applied to by the latter for information as to the construction of doubtful language in the policy.<sup>93</sup> So an agent may bind the company by an expression of opinion, and his error in so doing is that of the company.<sup>94</sup> It is held, however, in Iowa that the company is not bound by a representation to an applicant as to the legal effect of the policy.<sup>95</sup>

**§ 538. Agent—Power to Renew.**—A contract of renewal must be complete. Thus where an agent who represented sev-

<sup>90</sup> *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352; 50 N. W. Rep. 240.

<sup>91</sup> *Towle v. Ionla etc. Mut. F. Ins. Co.*, 91 Mich. 219; 51 N. W. Rep. 987.

<sup>92</sup> See *Golt v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189; *Carroll v. Charter Oak Ins. Co.*, 1 Abb. Dec. (N. Y.) 316; *Insurance Co. v. Eggleston*, 96 U. S. 572. per the court; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Miller v. Phoenix Ins. Co.*, 27 Iowa, 203; 1 Am. Rep. 262; *Kenyon v. Knights Templar*, 122 N. Y. 247. And see sections following under this chapter.

<sup>93</sup> *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269; 44 N. W. Rep. 1104.

<sup>94</sup> *Campbell v. International L. Assur. Soc.*, 4 Bosw. (N. Y.) 298, 310.

<sup>95</sup> *Dryer v. Security F. Ins. Co. (Iowa, 1896)*, 62 N. W. Rep. 798; 24

eral companies failed, by mistake, to renew policies to the full amount requested by the insured, those companies in which the agent had not renewed were declared not bound.<sup>96</sup> But the company cannot question the authority of an agent to renew where it furnishes such agent with blank policies and renewal receipts, signed by the company's president and secretary, and the particular receipt in question also provided that it was not valid unless countersigned by the agent.<sup>97</sup> So a local agent has authority to renew,<sup>98</sup> and an agent supplied with blank policies, signed by the company's officers, and empowered to fill up and deliver them without consulting the company, may bind the company by a parol agreement to renew the policies issued by him, and to keep the plaintiff's property insured.<sup>99</sup> But the company is not bound by its agent's mere naked parol promise to renew a policy when it runs out,<sup>100</sup> although a general agent may make a valid agreement to extend a policy where he is authorized to receive applications for insurance and reinsurance, with power to make the application binding until the company's disapproval is communicated to the assured, and it appears that the policy in question was not disapproved.<sup>101</sup>

**§ 539. Revival of Policy by Agent.**—In case the agent has no actual authority, nor any apparent authority acquiesced in by the company, he has no power to waive a forfeiture so as to revive a lapsed policy;<sup>102</sup> nor has a life insurance agent any authority to revive a policy forfeited for non-

Ins. L. J. 541. See *Southern Ins. Co. v. White*, 58 Ark. 277; 24 S. W. Rep. 425.

<sup>96</sup> *Johnson v. Connecticut F. Ins. Co.*, 84 Ky. 470; *O'Reilly v. Corporation of London Assur. Soc.*, 101 N. Y. 575. See *Dunning v. Phoenix Ins. Co.*, 68 Ill. 414.

<sup>97</sup> *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292.

<sup>98</sup> *Banble v. Aetna Ins. Co.*, 2 Dill. (C. C.) 156.

<sup>99</sup> *Banble v. Aetna Ins. Co.*, 2 Dill. (C. C.) 156. See, also, *Taylor v. Germania Ins. Co.*, 2 Dill. (C. C.) 282.

<sup>100</sup> *Croghan v. New York Underwriters' Agency*, 53 Ga. 109. See *O'Reilly v. Corp. London Assur.*, 101 N. Y. 575; *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365.

<sup>101</sup> *Seeds v. Mechanics' Ins. Co.*, 8 N. Y. (4 Seld.) 351.

<sup>102</sup> *Metropolitan L. Ins. Co. v. McGrath* (N. Y.), 19 Atl. Rep. 386.

payment of premium by giving an antedated receipt therefor;<sup>103</sup> nor can an agent revive a canceled policy rejected by the company unless authorized so to do in the specific case.<sup>104</sup> And where a policy is delivered for cancellation to an agent authorized to cancel, it is not revived in case a redelivery is made by the agent, a loss having intervened of which the agent has knowledge.<sup>105</sup> But in so far as an agent of the company has power to waive a forfeiture of the policy, he has authority to revive the same, inasmuch as a waiver of forfeiture operates as a revival. This may arise from the agent's giving a renewal receipt with a knowledge of the facts from which a forfeiture may arise,<sup>106</sup> or by a receipt of the premium,<sup>107</sup> or by some other unequivocal act of waiver of the forfeiture.<sup>108</sup> In case, however, the policy is absolutely forfeited, it is intimated that there must be a new contract, founded on a valid consideration, or such conduct by the company or its agent as misleads the insured to his prejudice and operates as an estoppel.<sup>109</sup> The general rule, however, to be deduced from the

<sup>103</sup> *Diboll v. Aetna L. Ins. Co.*, 32 La. Ann. 179.

<sup>104</sup> *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502.

<sup>105</sup> *Crown Point Iron Co. v. Aetna Ins. Co.*, 53 Hun (N. Y.), 220.

<sup>106</sup> *Miner v. Phoenix Ins. Co.*, 27 Wis. 603; 9 Am. Rep. 479; *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415; 32 Am. Rep. 330.

<sup>107</sup> *Walsh v. Aetna L. Ins. Co.*, 30 Iowa, 133; 6 Am. Rep. 664.

<sup>108</sup> See *Weed v. London L. F. Ins. Co.*, 116 N. Y. 108; *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379; 8 Am. Rep. 556; *Rice v. New England Mut. Aid Soc.*, 146 Mass. 248; *Cotton v. Fidelity & Cas. Co.*, 41 Fed. Rep. 506.

<sup>109</sup> *New York Cent. Ins. Co. v. Watson*, 23 Mich. 486; *Brink v. Hanover Ins. Co.*, 70 N. Y. 593, per the Court; *Smith v. Saratoga Mut. F. Ins. Co.*, 3 Hill (N. Y.), 508; *Neely v. Onondaga Mut. Ins. Co.* 7 Hill (N. Y.), 49. The last two cases have been cited (1 *Parsons on Marine Insurance*, ed. 1868, 42) as sustaining the proposition that "where a policy is made absolutely void by a breach of any of its conditions, it is not revived by a mere waiver." But in *Sherman v. Niagara F. Ins. Co.*, 46 N. Y. 526; 7 Am. Rep. 380, the court, per Church, C. J., says: "I am aware that there is an intimation by Bronson, J., in *Smith v. Saratoga Co. Mut. F. Ins. Co.*, 3 Hill (N. Y.), 508, that a mere waiver would not revive such a policy. He says 'it is difficult to see how anything short of a new creation could impart vitality to this dead body.' He did not, however, intend to decide the question of waiver, and added: 'But it is unnecessary to put this case upon the ground that the forfeiture could not be waived; and then proceeds to show that there had been no waiver. In 7 Hill (N. Y.), 49, in a similar case, *Beardsley, J.*, said: 'Whether a policy, after having become

cases may be stated as follows: If an agent's authority is such that he may issue policies and make contracts of insurance, such power necessarily implies, as incident thereto, the right to revive lapsed or voided policies or to renew contracts, provided the original contract at its inception was neither illegal nor against public policy; and the same rule would apply in any case where the agent had apparent authority to act in the premises, and the assured had no knowledge, actual or constructive, of any limitations thereon to the contrary.<sup>110</sup> But no new agreement entered into between the agent and the assured can validly, by renewal or otherwise, carry into effect the provisions of another agreement which is contrary to public policy and void at common law.<sup>111</sup>

**§ 540. Power of Agent to Orally Waive.**—If it be conceded, as it must be, that an agent has power to waive conditions, then, in the absence of known restrictions upon his authority, such waiver may be made by parol. The oral waiver need not necessarily be an actual agreement, but may arise from statements made by the agent from which a waiver may be inferred.<sup>112</sup> So it is held in Kansas that a general agent may modify the written contract, or waive conditions therein, by parol, notwithstanding restrictions upon the agent's powers

void by the alienation of the property insured, can be restored to vitality by a mere act of waiver on the part of the underwriters need not now be decided.' Precisely what is intended as a mere act of waiver' is not very clear, but it is probable that both the learned judges intended to make a distinction between such an act and an act which would amount to an agreement to revive and continue the contract. I have been unable to find any adjudged case holding that such a forfeiture may not be waived and such policy revived by an act from which the consent of the underwriters may fairly be inferred."

<sup>110</sup> See *Wolfe v. Security F. Ins. Co.*, 39 N. Y. 51; *Howell v. Knickerbocker F. Ins. Co.*, 44 N. Y. 276; 4 Am. Rep. 675; *Keeler v. Niagara F. Ins. Co.*, 16 Wis. 523; 84 Am. Dec. 714; *Shearman v. Niagara F. Ins. Co.*, 46 N. Y. 526; 7 Am. Rep. 380, opinion of the Court; *Franklin F. Ins. Co. v. Murray*, 73 Pa. St. 13, 28; *Washington F. Ins. Co. v. Davidson*, 30 Md. 91. And see, also, chap. XVIII, herein.

<sup>111</sup> *Gray v. Hook*, 4 N. Y. 449; *Woodworth v. Bennett*, 43 N. Y. 273; 3 Am. Rep. 706.

<sup>112</sup> See *Kruger v. Western F. & M. Ins. Co.*, 72 Cal. 91. See secs. 441, 442 herein.



in the policy.<sup>113</sup> But in case the assured places an encumbrance upon his property, and requests the agent to do certain acts to secure him, which the agent says he cannot do, but that "it would be all right anyway," there is no waiver.<sup>114</sup> In another case the assured, who was going away, requested the agent to renew his policy before he left, which he agreed to do, saying it would be "all right." The assured went away, and after his return the property was destroyed by fire. No new premium was paid, as was required under a condition in the old policy. It was held that there was no waiver of the condition as to payment of the premium.<sup>115</sup> There is also a class of cases which hold that where the policy makes provision as to the manner in which conditions can be waived, that it must be done in that way. We have, however, considered this question elsewhere.

**§ 541. Where Agent Fails to Take Advantage of Forfeiture.**—If an agent has knowledge that a ground for forfeiture exists, and thereafter by some act recognizes the contract as valid, there is a waiver;<sup>116</sup> and if the local agent is informed of the removal of goods before a loss, and the company neglects to cancel the policy, it is liable.<sup>117</sup> So in case of such knowledge on the part of an agent, and his neglect to take advantage of the forfeiture, there is a waiver, as where he knows of other insurance and fails to cancel the policy, there is no forfeiture, even under a condition requiring the indorsement in the policy of such other insurance.<sup>118</sup> And where a local agent consents to a conveyance contrary to the stipulations of the policy, and no forfeiture is declared, the company will be presumed to have assented to the conveyance;<sup>119</sup> and the same rule obtains in case the agent writing the insurance

<sup>113</sup> *Insurance Co. v. Gray*, 43 Kan. 497, distinguishing between authority of general agent and of soliciting agent.

<sup>114</sup> *Bosworth v. Cleary*, 80 Wis. 393; 49 N. W. Rep. 750

<sup>115</sup> *Taylor v. Phoenix Ins. Co.*, 47 Wis. 365.

<sup>116</sup> *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434.

<sup>117</sup> *Williamsburg City F. Ins. Co. v. Cary*, 83 Ill. 453.

<sup>118</sup> *Hamilton v. Home Ins. Co.*, 94 Mo. 353; 7 S. W. Rep. 261; 13 West. Rep. 602.

<sup>119</sup> *Illinois F. Ins. Co. v. Stanton*, 57 Ill. 354.

knows of the use of gasoline on the premises, and the general agent, with like knowledge, fails to cancel the policy, the company is bound, notwithstanding a condition prohibiting such use.<sup>120</sup> In another case an application was made to A and B, local agents, who were mere surveying agents. The application was forwarded to the company, which sent the policy directly to the assured. A and B dissolved partnership. A became the company's "recording agent," with power to issue policies, etc. B continued as surveying agent. A being thereafter applied to by the assured for further insurance, referred him to B, who sent him to agents of other companies. Other insurance was obtained, and B was informed thereof, but made no objection, nor was the assured informed that his policy was rendered void by additional insurance. The consent of the secretary of the company to such other insurance was not indorsed on the policy as required by the terms of the policy. It was held that the agent's acts amounted to a waiver or estoppel.<sup>121</sup> But it is held in Iowa<sup>122</sup> that if an agent has knowledge of acts of the assured which would avoid the policy, and fails to object, the company is not bound. It is also decided in Texas<sup>123</sup> that the failure of the agent to have the policy declared forfeited, where he knows that the building insured is to be used for a different purpose, does not constitute a waiver where the agent only has authority to take applications and deliver them.

**§ 542. Waiver by Receiving Premium—Agent.**—A waiver of a condition of a forfeiture may arise from the receipt of the premium by the company's agent with knowledge of the breach of the condition or of the forfeiture. So there may be a waiver of defenses which might have been pleaded in avoidance of the policy where the

<sup>120</sup> *Farmers & Merchants' Ins. Co. v. Nixon*, 2 Col. App. 265; 30 Pac. Rep. 42.

<sup>121</sup> *American Ins. Co. v. Gallatin*, 48 Wis. 36, Ryan, C. J., dissenting.

<sup>122</sup> *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176; 85 Am. Dec. 553.

<sup>123</sup> *Sun Mut. Ins. Co. v. Texarkana F. etc. Co. (Tex.)*, 15 S. W. Rep. 84.

agent, with knowledge of the facts, receives the unpaid premium from the beneficiary after the death of the assured;<sup>124</sup> and a forfeiture for violation of a condition for residing in a restricted district may be waived by the agent's receiving the premium with knowledge of the fact.<sup>125</sup> There is also a waiver by the agent's receiving the renewal premium after knowledge of a change in the location of the goods insured,<sup>126</sup> or after knowledge of other insurance,<sup>127</sup> or that the insured had sold the property and taken back a mortgage;<sup>128</sup> and if the case is one where the rule would apply that knowledge of the agent is knowledge of the company, the receipt of premiums by the company after knowledge by the agent of a breach of a condition or of a forfeiture operates as a waiver or an estoppel;<sup>129</sup> as where the company was held estopped by laying an assessment to defend a suit on the policy on the ground that benzine was kept upon the premises contrary to a condition of the policy.<sup>130</sup> But if an assessment is made by mistake by an agent of the company, and never collected, there is no waiver of a forfeiture for over-insurance.<sup>131</sup> The mere act, however, of receiving a premium or an assessment does not operate as an estoppel against a life insurance company availing itself of a forfeiture, unless the assured made the payment relying upon the acts, declarations, or silence of the company or its agents that the forfeiture was or would be waived.<sup>132</sup> Nor is the company estopped from setting up a forfeiture by reason of an assessment made under a policy on property over-insured where the agent was instructed not to collect the same,

<sup>124</sup> *Cotton v. Fidelity etc. Ins. Co.*, 41 Fed. Rep. 506.

<sup>125</sup> *Walsh v. Aetna L. Ins. Co.*, 30 Iowa, 133; 6 Am. Rep. 664.

<sup>126</sup> *Ludwig v. Jersey City Ins. Co.*, 48 N. Y. 379; 8 Am. Rep. 556.

<sup>127</sup> *Carroll v. Charter Oak Ins. Co.*, 1 Abb. App. Dec. (N. Y.) 316.

<sup>128</sup> *Whited v. Germania F. Ins. Co.*, 13 Hun (N. Y.), 191; *Miner v. Phoenix Ins. Co.*, 27 Wis. 693; 9 Am. Rep. 479.

<sup>129</sup> See *McGurk v. Metropolitan L. Ins. Co.*, 56 Conn. 528; 1 L. R. Annot. 563.

<sup>130</sup> *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418; 38 Am. Rep. 687.

<sup>131</sup> *Elliott v. Lycoming Co. Mut. Ins. Co.*, 66 Pa. St. 22; 5 Am. Rep. 323.

<sup>132</sup> *Northwestern Mut. L. Ins. Co. v. Ammerman*, 119 Ill. 329; 10 N. E. Rep. 225.

but made demand therefor, although he did not collect the same.<sup>133</sup>

**§ 543. Waiver by Delivery of Policy—Agent.**—A waiver may exist or an estoppel arise where the authorized agent of the company, with knowledge of a breach of a condition in the policy, or of the existence of a state of facts prohibited by the terms of the contract, delivers the policy to the assured. This rule has been applied to cases of other insurance,<sup>134</sup> where the agent has full knowledge of the state of the title,<sup>135</sup> or where he knows that petroleum oil is kept,<sup>136</sup> or that the building stands on leased land.<sup>137</sup>

**§ 544. Knowledge not Obtained in Course of Agent's Employment.**—It is necessary that the knowledge of an agent, in order to bind the company, should have been obtained by him in the course of his employment. If obtained while doing an act in no way connected with his agency, the company is not bound. Thus, if an agent be employed as an attorney, and in that capacity draws up certain papers transferring the property covered by the policy, his declarations to the transferee as to the need of the transfer and the validity of the policy do not bind the company.<sup>138</sup> But it is declared in *Wisconsin*<sup>139</sup> that although the information in question was not acquired by the agent in his capacity as such, nor while engaged in the transaction of his principal's business, the insurer will nevertheless be bound if the agent possessed such knowledge when he received the policy.<sup>140</sup> But knowledge acquired by

<sup>133</sup> *Elliott v. Lycoming Co. etc. Ins. Co.*, 66 Pa. St. 22; 5 Am. Rep. 323.

<sup>134</sup> *Putnam v. Commonwealth Ins. Co.*, 4 Fed. Rep. 753; citing *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415.

<sup>135</sup> *Liverpool & London etc. Ins. Co. v. Ende*, 65 Tex. 118.

<sup>136</sup> *Kruger v. Western F. & M. Ins. Co.*, 72 Cal. 91; 13 Pac. Rep. 156.

<sup>137</sup> *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369; 12 S. W. Rep. 915.

<sup>138</sup> *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352, 355; 50 N. W. Rep. 240. See *Satterfield v. Malone*, 35 Fed. Rep. 445, as to general rule relating to agency.

<sup>139</sup> *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361.

<sup>140</sup> See *Miller v. Oswego etc. Ins. Co.*, 18 Hun (N. Y.) 525.

rumor by a director or other agent does not bind the company, for an agent is not obliged to charge his mind with rumors or loose information coming to his knowledge.<sup>141</sup> But it is held that if the matter of additional insurance be spoken of only incidentally in the course of conversation, or if the secretary or clerk of the company accidentally learns thereof, there is such notice as binds the company.<sup>142</sup>

**§ 545. That Agent Might have Learned by Ordinary Diligence of the Existence** of certain facts will not operate to relieve the assured from a forfeiture, as where he might have learned of a prior insurance when he issued a later policy, the company is not liable.<sup>143</sup>

**§ 546. Agent's Knowledge Obtained in Individual Capacity.**—If an agent has merely authority to take applications and deliver them, and his knowledge of a breach of warranty comes to him in his individual capacity after the contract of insurance is made, there is no waiver of forfeiture.<sup>144</sup> It is also held that if a director receives notice in his private capacity, the company is not bound.<sup>145</sup> And the defendant company was declared not bound by knowledge ascertained by an agent of another company, although such agent sometimes represented the defendant;<sup>146</sup> and where a broker obtained a policy for another through the company's proper agent, it was held that a waiver did not arise from such broker's knowledge of the use of forbidden articles on the premises insured.<sup>147</sup>

<sup>141</sup> *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517; 69 Am. Dec. 174; *Schaefer v. Phoenix Ins. Co.*, 53 Wis. 361. See, also, *Keenan v. Dubuque Ins. Co.*, 13 Iowa, 375. *Examine Farrell Foundry v. Dart*, 28 Conn. 376, and text ending of sec. 404 herein.

<sup>142</sup> *Eureka Ins. Co. v. Robinson*, 56 Pa. St. 266-68; 94 Am. Dec. 65.

<sup>143</sup> *Landers v. Cooper*, 115 N. Y. 279; 22 N. E. Rep. 212.

<sup>144</sup> *Sun Mut. Ins. Co. v. Texarkana etc. Co. (Tex.)* 15 S. W. Rep. 34. See, also, *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176; 85 Am. Dec. 553.

<sup>145</sup> *General Ins. Co. v. United States Ins. Co.*, 10 Md. 517; 69 Am. Dec. 174.

<sup>146</sup> *Lycoming Ins. Co. v. Mitchell*, 48 Pa. St. 367.

<sup>147</sup> *Kings County F. Ins. Co. v. Swigert*, 11 Ill. App. 590. See *Solms v. Rutgers etc. Ins. Co.*, 8 Bosw. (N. Y.) 578.

But in *Deitz v. Providence-Washington Insurance Company*<sup>149</sup> the distinction made in an instruction between knowledge of an agent as such and knowledge in his individual capacity is declared to be too refined for the average jurymen to comprehend.

**§ 547. Knowledge of Company at Whose Instance Another Company Issues Policy.**—It is held in a New York case<sup>149</sup> that if an application is made to an insurance company for a policy, and, at such company's instance, another company issues the policy, that the latter company is not chargeable with material facts known to the former but not communicated to the latter.

**§ 548. Agent's Power to Grant Permits Affecting Risk.** An agent may, while acting within the apparent scope of his authority, consent to a waiver of conditions, or grant permits which are in effect a waiver of the same, even though he has no actual authority so to do, provided the insured has no knowledge of his limited powers. Thus, a special agent may grant permits to reside in restricted territory, although he is only authorized to receive applications and money for such permits, but may not grant them;<sup>150</sup> and an agent empowered to make and renew policies, and to indorse thereon permission to vary the risk under the company's instructions, may give a permit to run an insured factory day and night.<sup>151</sup> So an agent with authority to receive premiums may grant permission to remove insured property, especially where he is paid a premium for the extra risk incurred thereby;<sup>152</sup> and a policy will cover property in an addition to a building in which the insured property is located where the agent indorses on said policy permission to make such addition, "all policies concurrent," and he knows at the time that the other policies referred to had been extended to cover the entire property.<sup>153</sup> So if a

<sup>149</sup> 33 W. Va. 526, 545; 11 S. E. Rep. 50.

<sup>149</sup> *Solms v. Rutgers etc. Ins. Co.*, 8 Bosw. (N. Y.) 578.

<sup>150</sup> *Walsh v. Aetna L. Ins. Co.*, 30 Iowa, 133; 6 Am. Rep. 664.

<sup>151</sup> *North Berwick Co. v. New England etc. Ins. Co.*, 52 Me. 336.

<sup>152</sup> *New England etc. Co. v. Schettler*, 38 Ill. 166.

<sup>153</sup> *Butterworth v. Western Assur. Co.*, 132 Mass. 480.

local agent has been accustomed to grant permits for removal of goods, and has always notified insurer thereof upon blanks furnished by insurer for that purpose, and has never been notified to discontinue the practice, and such permission is given, the company is bound.<sup>154</sup> But an agent authorized to solicit and forward applications has no power to grant oral permission to store an explosive on the premises, and, in case he does so, the company is not estopped, unless it be shown that it had permitted like acts, or had knowledge of such permission and did not object, or unless the agent held himself out as authorized so to act.<sup>155</sup>

**§ 549. Agent—Power to Alter Policy.**—A general agent has authority to so alter the description of the property covered by the policy as to make it accurate,<sup>156</sup> and the company is bound by the act of its agent in erasing a material stipulation in the policy before its delivery where the applicant had no knowledge of the agent's want of authority to so act, and the agent was intrusted with intermediary certificates signed by the secretary, and authorized to deliver the same to the applicants.<sup>157</sup> So an agent with power to fill out and issue policies may, before its delivery and acceptance, change the description by a memorandum added to the policy stating that the buildings were being constructed,<sup>158</sup> and a memorandum indorsed on the policy by the agent before its delivery and acceptance, as to the manner of settling losses, binds the company, although the same be inconsistent with the printed terms of the policy.<sup>159</sup> So the authority of an agent to modify the contract may be inferred from a course of dealing with insured and the company's recognition of these acts.<sup>160</sup> And a general agent may, in case of mistake, change the name of the party to

<sup>154</sup> *Burlington Ins. Co. v. Threlkeld*, 60 Ark. 539.

<sup>155</sup> *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa 507; 96 Am. Dec. 65.

<sup>156</sup> *Warner v. Peoria etc. Ins. Co.*, 14 Wis. 318.

<sup>157</sup> *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; 15 Am. Rep. 612.

<sup>158</sup> *Gloucester Mfg. Co. v. Fire Ins. Co.*, 5 Gray (Mass.), 497; 66 Am. Dec. 376.

<sup>159</sup> *Hugg v. Augusta Ins. etc. Co.*, Taney (C. C.), 159.

<sup>160</sup> *Day v. Mechanics' etc. Ins. Co.*, 88 Mo. 325; 4 West. Rep. 614.

whom the loss is payable.<sup>161</sup> Again, it is within the power of an agent with authority to issue and countersign policies to strike out certain parts of a condition as to keeping books locked in a fire-proof safe at night.<sup>162</sup> And in general, where he has apparent authority to act in the premises and the assured has no knowledge of restrictions to the contrary, or where there is no limitation in the policy on his authority, his power to alter or modify is coextensive with that of his principal.<sup>163</sup> If an agent, without authority, alters a policy to conform to the contract agreed upon, and it becomes void in consequence, the company is liable after a loss upon the agreement as made.<sup>164</sup> But a local agent is not necessarily authorized, by virtue of his general powers as such, to alter, change, or vary the terms of the contract;<sup>165</sup> and where such agent has only authority to solicit risks, receive and write applications, deliver policies, and collect premiums, he is not thereby empowered to waive forfeitures or alter any of the material conditions of the contract, nor agree to other insurance;<sup>166</sup> nor has an agent with similar powers authority to change the policy by making the loss payable to another than the assured.<sup>167</sup>

**§ 550: Agents—Powers in Relation to the Premium.**  
A general agent may give credit for a renewal premium or take a note therefor,<sup>168</sup> although it is held that a broker employed

<sup>161</sup> *Solms v. Rutgers F. Ins. Co.*, 3 Keyes (N. Y.), 416.

<sup>162</sup> *Parsons v. Knoxville F. Ins. Co.* (Mo. 1895) 31 S. W. Rep. 117.

<sup>163</sup> See *Schomer v. Insurance Co.*, 50 Wis. 575; 7 N. W. Rep. 544; *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 194; *Alexander v. Insurance Co.*, 67 Wis. 422; 30 N. W. Rep. 727; *Washington F. Ins. Co. v. Davidson*, 30 Md. 91; *Banble v. Aetna Ins. Co.*, 2 Dill. (C. C.) 156; *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123; *Silverberg v. Insurance Co. (Cal.)*, 7 Pac. Rep. 38; 67 Cal. 36; *New England etc. Ins. Co. v. Schettler*, 38 Ill. 166; *Wood v. Poughkeepsie Ins. Co.*, 32 N. Y. 619.

<sup>164</sup> *Bunten v. Orient Mut. Ins. Co.*, 2 Keyes (N. Y.), 667.

<sup>165</sup> *Clevenger v. Mutual L. Ins. Co.*, 2 Dak. 114.

<sup>166</sup> *American F. Ins. Co. v. Hampton*, 54 Ark. 75, 78; 14 S. W. Rep. 1002.

<sup>167</sup> *Duluth Nat. Bank v. Knoxville F. Ins. Co.*, 85 Tenn. 76.

<sup>168</sup> *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Franklin F. Ins. Co. v. Massey*, 33 Pa. St. 221; *L. Ins. Co. v. Colt*, 20 Wall. (U. S.) 560; *Marsh v. Northwestern Nat. Ins. Co.*, 3 Biss. (C. C.) 351, 358; *Heaton v. Manhattan F. Ins. Co.*, 7 R. I. 502.



to affect insurance cannot waive prepayment of the premium by giving credit.<sup>169</sup> So an agent clothed with apparent authority may receive a note for the premium,<sup>170</sup> and agree with the insured that it will be returned if the policy is rejected. The company is bound by such acts of its agent, and, in case of rejection, it cannot sustain an action on the note.<sup>171</sup> And an agent authorized to take and approve risks and issue policies is by general usage empowered to allow credit for premiums,<sup>172</sup> and he may accept a check therefor;<sup>173</sup> and it is so held where the check has even been dishonored.<sup>174</sup> But an agent has no authority to accept personal property in lieu of money for the premium; such act is a fraud upon the company, and no valid contract can arise therefrom;<sup>175</sup> and the soliciting agent may only receive cash,<sup>176</sup> although payment to an agent in confederate notes, while the confederacy existed as a government *de facto*, has been declared valid.<sup>177</sup> So an agent may, however, receive premiums on deposit on incompleting contracts where he has authority to receive them on accepted risks,<sup>178</sup> and delivery of the premium to an expressman to be forwarded at the agent's request is delivery to the company, although the carrier embezzles the money.<sup>179</sup> A life insurance agent authorized to collect premiums, but having no authority to issue policies,

<sup>169</sup> *Maryland v. Royal Ins. Co.*, 71 Pa. St. 393.

<sup>170</sup> *Mississippi Valley L. Ins. Co. v. Neyland*, 9 Bush (Ky.), 430; *New York L. Ins. Co. v. McGowan*, 18 Kan. 300.

<sup>171</sup> *Jacoway v. German Ins. Co.*, 49 Ark. 320; 5 S. W. Rep. 339.

<sup>172</sup> *Tennant v. Travelers' Ins. Co.*, 31 Fed. Rep. 322; *Insurance Co. v. Colt*, 20 Wall, 560; *Homer v. Guardian L. Ins. Co.*, 67 N. Y. 478. See, also, *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117; 10 Am. Rep. 566.

<sup>173</sup> *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390; *Lycoming M. F. Mut. Co. v. Bedford (Pa.)*, 2 Week. Not. Cas. 529. But see *Neill v. Union Mut. L. Ins. Co.*, 45 U. C. Q. B. 593; 7 Ont. App. 171.

<sup>174</sup> *Aetna L. Ins. Co. v. Green*, 38 U. C. Q. B. 459.

<sup>175</sup> *Hoffman v. Hancock Mut. L. Ins. Co.*, 92 U. S. (2 Otto) 161.

<sup>176</sup> *Raub v. New York Ins. Co.*, 14 N. Y. 573. See *Hoffman v. John Hancock L. Ins. Co.*, 92 U. S. (2 Otto) 161.

<sup>177</sup> *Robinson v. International L. Ins. Co.*, 42 N. Y. 54; 1 Am. Rep. 400.

<sup>178</sup> *Hallock v. Insurance Co.*, 26 N. J. L. (2 Dutch.) 268.

<sup>179</sup> *Currier v. Continental L. Ins. Co.*, 53 N. H. 538; *Whitley v. Piedmont etc. Co.*, 71 N. C. 480.

can grant no extension of time for the payment of an installment of the premium note.<sup>180</sup> But it has been held that a general agent, with authority to solicit applications and receive the first premiums, may make himself personally responsible for a portion of the first premium.<sup>181</sup> An agent authorized to deliver the policy may receive the premium and bind the company thereby, the important thing being the payment of the money; it is sufficient if it is paid to and accepted by one having the apparent authority to act in the matter, whether such payment be strictly in conformity to the terms of the contract or not.<sup>182</sup> Where a policy provides that premiums must be paid at the home office, but there is an indorsement on the policy requiring receipts for premiums paid at agencies to be signed by certain officers of the company, the contract is not thereby varied so as to make any particular agency the place of payment. Notice is merely given that if the insured pays an agent, he must obtain a receipt signed by the designated officers.<sup>183</sup> If an agent receives and negotiates a draft for the premium, without giving the receipt signed as required, the issue of the policy is a waiver by the company.<sup>184</sup> So one to whom a policy is given for delivery becomes an agent to receive the premium where the policy acknowledges the receipt thereof;<sup>185</sup> but where the local agent, who had a policy on his own life and who was also an express agent, sent the money by express several days after it was payable, and it was not, for some reason, received by the general agent until after the assured died, it was held that the company was not liable, although the policy gave thirty days' grace after the premium was due, subject to the option of the company, to receive it.<sup>186</sup>

<sup>180</sup> *Critchett v. American Ins. Co.*, 53 Iowa, 404; 36 Am. Rep. 230.

<sup>181</sup> *Mississippi Valley L. Ins. Co. v. Neyland*, 9 Bush (Ky.), 430.

<sup>182</sup> *Gosch v. State Mut. F. Ins. Co.*, 44 Ill. App. 263; 24 Chi. Leg. N. 276; *Greenwich Ins. Co. v. Union etc. Co.*, 14 Daly (N. Y.) 237. See, also, *Lycoming F. Ins. Co. v. Ward*, 90 Ill. 545; *Sun Mut. Ins. Co. v. Saginaw Barrel Co.*, 114 Ill. 99; *Riley v. Commonwealth Mut. F. Ins. Co.*, 110 Pa. St. 144.

<sup>183</sup> *Insurance Co. v. Davis*, 95 U. S. (5 Otto) 425.

<sup>184</sup> *Leonard v. Washburn*, 100 Mass. 251, 254.

<sup>185</sup> *Lebanon Mut. Ins. Co. v. Erb*, 112 Pa. St. 149.

<sup>186</sup> *Donald v. Life Ins. Co.*, 4 S. C. 321.

**§ 551. Agent's Authority to Fix Rates for Premium.** Although an agent be only authorized to act in a limited capacity, yet if he has apparent authority to represent the company in relation to fixing rates of premiums, and does so, the company is bound thereby, unless the assured has knowledge of the agent's limited powers.<sup>187</sup>

**§ 552. Agent's Agreement to Give Notice Where Premium Due.**—Where an agent of a company agrees to give notice of the falling due of each premium note, and neglects to do so, this operates as a waiver of a forfeiture arising from nonpayment of the note at maturity;<sup>188</sup> although it is held that a promise made by a local agent of a life company to give such notice is not binding upon the company, unless the agent was specially authorized to make the agreement.<sup>189</sup>

**§ 553. Agent's Authority in Regard to First and Subsequent Premiums.**—Where an agent has only authority to countersign and deliver policies and to receive the advance premium, it is held that he is not thereby empowered to act in relation to subsequent annual premiums.<sup>190</sup>

**§ 554. Agent's Powers in Relation to Premiums—What Agent may Waive.**—Where the general agent of an insurance company has been accustomed, with the knowledge and acquiescence of the company, to receive payments of overdue premiums, it will be presumed that he has special authority to extend the time of payment of the same.<sup>191</sup> And upon the

<sup>187</sup> Perkins v. Washington Ins. Co., 4 Cow. (N. Y.) 645. This was held in a case where a bill in equity was brought to compel the execution of a policy and payment of a loss. The agent was appointed as surveyor of the defendant company, with authority to state probable rates, subject to acceptance by the company, and he acted under private instructions. The company had uniformly accepted former risks under the same or not more favorable terms, and it was held bound.

<sup>188</sup> Alexander v. Continental Ins. Co., 67 Wis. 422; 30 N. W. Rep. 727.

<sup>189</sup> Morey v. New York L. Ins. Co., 2 Wood (C. C.), 663.

<sup>190</sup> Bonton v. American Mut. L. Ins. Co., 25 Conn. 542; Critchett v. American Ins. Co., 53 Iowa, 404; 36 Am. Rep. 230. See next section.

<sup>191</sup> Wyman v. Phoenix Mut. L. Ins. Co., 119 N. Y. 274; 23 N. E. Rep. 907. See Insurance Co. v. Norton, 96 U. S. 234.

question of the agent's authority to extend the time of payment of the premium, a note given to the agent on a former occasion when he extended such time of payment is admissible in evidence, it also appearing that the company then acquiesced in the agent's acts.<sup>192</sup> So the company is bound by a common practice of its agents to receive the premium after it becomes due.<sup>193</sup> A foreign insurance company is bound by the knowledge of its general agent of the fact that the insured was in the habit of paying premiums after they became due,<sup>194</sup> and where the company receives the amount of a note from its agent after it becomes due, it is bound, although there is conflicting evidence whether the agent extended the time of its payment or not.<sup>195</sup> And the company is liable where the assured pays the premium to an agent under a policy delivered by the latter, and which contains no condition relative to forfeiture for non-payment thereof.<sup>196</sup> Again, if the agent creates by indulgence the belief in the mind of the assured that a forfeiture for non-payment of the premium is waived, it is waived.<sup>197</sup> So the company is bound by a notice given by its general agent that the premium was due May 29th, and that the policy would be void unless the same was paid on or before thirty days from date, and the thirtieth day falling on Sunday, a tender was held good made on the Monday following.<sup>198</sup> And where the agent has notice that the insured is sick when a premium is due, and he takes the money and turns it over to the company, there is no forfeiture.<sup>199</sup> So if the agent receives after loss an overdue assessment, which he transmits to the company, and the latter

<sup>192</sup> *Dean v. Aetna L. Ins. Co.*, 4 *Thomp. & C.* (N. Y.) 497.

<sup>193</sup> *Buckle v. United States Ann. & Trust Co.*, 18 *Barb.* (N. Y.) 541; *Unsell v. Hartford L. & A. Ins. Co.*, 32 *Fed. Rep.* 443; *Thompson v. St. Louis Mut. L. Ins. Co.*, 52 *Mo.* 469; *Piedmont & Arlington L. Ins. Co. v. McLean*, 31 *Gratt.* (Va.) 517; *Mound City L. Ins. Co. v. Twining*, 19 *Kan.* 349; *Insurance Co. v. Norton*, 96 *U. S.* 234.

<sup>194</sup> *Phoenix Mut. L. Ins. Co. v. Hinesly*, 75 *Ind.* 1.

<sup>195</sup> *Hodson v. Guardian L. Ins. Co.*, 97 *Mass.* 144.

<sup>196</sup> *Pennsylvania etc. Co. v. Carter* (Pa. 1887), 11 *Atl. Rep.* 102.

<sup>197</sup> *Winindger v. Globe Mut. L. Ins. Co.*, 3 *Hughes* (C. C.) 257.

<sup>198</sup> *Campbell v. International L. Soc.*, 4 *Bosw.* (N. Y.) 298.

<sup>199</sup> *Piedmont etc. L. Ins. Co. v. Lester*, 59 *Ga.* 812.

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retains it, there is a waiver of forfeiture,<sup>200</sup> and if the assured is misled by the insurer's agent to believe that prompt payment of the premium would not be strictly enforced, and four days after it became due the assured died, an offer to pay after death was held good.<sup>201</sup> So if the agent who solicited the insurance, and whose duty it is to collect the premium, fails to demand its payment, and upon the tender thereof tells the insured to let it rest until it is determined by the company whether it will cancel the policy, there is a waiver of payment at the time;<sup>202</sup> and where the agent said he had not the receipt with him, but would keep the policy good, prompt payment was held to be waived.<sup>203</sup> In *Knickerbocker Life Insurance Company v. Norton*,<sup>204</sup> the policy provided, by an indorsement thereon, that "agents of the company are not authorized to make, alter, or abrogate contracts or waive forfeitures." Notes were given by the assured for the payment of the unpaid balance of the last premium, part of it having been paid in cash. These notes were not paid. Nonpayment of the premium, or of notes given therefor, voided the policy under its conditions, and the rules provided for forfeiture of the policy if they were not paid at maturity, this being the usual form of such notes. It had been the custom of the company to extend the time of payment of prior premium notes given by the insured. Evidence was also admitted as to the practice of the company in allowing its agents to extend the time for payment of premiums and of notes given for premiums, and agents were permitted to grant indulgence in such cases for periods of ninety, then of sixty, and then of thirty days. This evidence was objected to, but held admissible. The company had also authorized its agents to take notes, instead of money, for premiums by a constant practice of receiving such notes when taken by its agents. It also appeared that the agent had permitted an extension of the first note, but did not extend the second note; that before

<sup>200</sup> *Iycoming Co. Ins. Co. v. Schollenberger*, 44 Pa. St. 259.

<sup>201</sup> *Mayer v. Mutual L. Ins. Co.*, 38 Iowa, 304.

<sup>202</sup> *Mallory v. Ohio Farmers' Ins. Co.*, 90 Mich. 112; 51 N. W. Rep. 200.

<sup>203</sup> *Shear v. Phoenix Mut. Ins. Co.*, 4 Hun (N. Y.), 800.

<sup>204</sup> 96 U. S. 234.

the latter was due a tender was made of the amount due on the first note, which was refused. The agent, however, two days prior thereto, upon being informed that the assured desired to pay both notes, had given the figures showing the amount due on them. The agent testified that he did not recollect agreeing to extend the time on the first note, and the question was left to the jury to determine whether such agreement to extend time of payment had been made by the agent, and the jury found that there had been, which submission to the jury of said fact was held no error. Stress was laid upon the fact that the extension claimed was not given until after the first note became due, and forfeiture had occurred. It did not appear from the evidence that any distinction was made in granting extensions before or after maturity of such notes. A judgment for the plaintiff in the circuit court was affirmed, and it was held that the objection that the note was already past due when it was agreed to extend it was not sufficient to prevent the agreement from operating as a waiver of the forfeiture.<sup>204a</sup> In another case the policy was assigned as collateral security for a debt. Upon inquiry whether provision had been made to pay the premium made by the pledgee at the agent's office, the book-keeper stated that a part had been paid and the balance would be paid the next week. The pledgee, relying thereupon, did not meet the premium when due. The money referred to by the bookkeeper had, however, without his knowledge, been deposited by the pledgor for another purpose. It was held that the pledgee was entitled to the amount of his debt under a new policy which had been issued to the pledgor when the original policy had lapsed.<sup>205</sup> And although the agent has no authority to waive forfeitures, but receives payment when overdue of a premium note, and accounts therefor to the principal, who receives it without inquiry, forfeiture for delay in the payment is waived.<sup>206</sup> So an agent's representations as to the time of payment of premiums bind the company,<sup>207</sup> and the company

<sup>204a</sup> The opinion was given by Mr. Justice Bradley; three of the judges dissented, however.

<sup>205</sup> *Norwood v. Guerdon*, 60 Ill. 253.

<sup>206</sup> *Hodsdon v. Guardian L. Ins. Co.*, 97 Mass. 144; 93 Am. Dec. 73.

<sup>207</sup> *Campbell v. International etc. Assur. Soc.*, 4 Bosw. (N. Y.) 298.

is bound by its agent's statements that failure to pay the premiums when due would not operate as a forfeiture.<sup>208</sup> In another case the agent wrote twice for the amount on a premium note after its maturity, and requested its return by mail or express. The assured placed the amount in the mail on the same day he received the letter, but the money never reached the agent, and it was held that there was no forfeiture of the policy.<sup>209</sup> And where the agent, being indebted to the firm of which the insured was a member, agreed to debit the premium and pay the same to the company, it was held a sufficient payment.<sup>210</sup> Again, where a party obtained what he believed to be a participating policy, and orally notified the agent before the premium became due that he wished a paid-up policy, and the agent said it was "all right," and repeatedly promised to attend to it, but did not do so, and in consequence the insured failed to pay the premium, it was decided that the company was estopped to set up a forfeiture for such nonpayment.<sup>211</sup> So a person appointed as a special agent under a written contract which states his duties to be soliciting applications for membership, collecting membership fees, and building up the company, has power to waive the time of payment of dues on the policy, and he may extend the time of payment.<sup>212</sup> And a subagent may consent to a part payment of the premium.<sup>213</sup> In another case part of a premium had been paid to a local agent, to whom the duty of collecting the premiums was intrusted, and he, in excess of his limited powers, had given time for the payment of the balance, and it was held that the policy was not avoided.<sup>214</sup> So a local agent authorized to take risks and receive premiums has power to waive a forfeiture by receiving successive premiums after knowledge that the insured has traveled outside the limits prescribed in the policy without

<sup>208</sup> *Lovell v. St. Louis Mut. L. Ins. Co.*, 111 U. S. 264.

<sup>209</sup> *Palmer v. Phoenix Mut. L. Ins. Co.*, 84 N. Y. 63.

<sup>210</sup> *Chickering v. Globe Mut. L. Ins. Co.*, 116 Mass. 321.

<sup>211</sup> *Piedmont etc. L. Ins. Co. v. Young*, 58 Ala. 476; 29 Am. Rep. 770.

<sup>212</sup> *Palmer v. Industrial L. Assn.*, 131 Ind. 68; 30 N. E. Rep. 876.

<sup>213</sup> *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117.

<sup>214</sup> *Murphy v. Southern L. Ins. Co.*, 3 Baxt. (62 Tenn.) 440; 27 Am. Rep. 214, 761.

a permit;<sup>215</sup> and the officers of the company have power to make a parol contract for renewal,<sup>216</sup> and the president or secretary has authority to waive a forfeiture for nonpayment of premium, even though the terms of the policy are contra.<sup>217</sup>

**§ 555. Agent's Powers in Relation to Premium—When no Waiver—Cases.**—Where there was no payment nor tender of interest on the premium note for three months before the death of the assured, it was held that the forfeiture might be enforced.<sup>218</sup> So a mere book-keeper cannot bind the company by receiving an overdue premium on a forfeited policy, where he has never done so except under instructions from the company's secretary.<sup>219</sup> And where an overdue premium was still unpaid when the assured died, and evidence was offered to show that the agent of the company, prior to the delivery of the policy, told the assured that it would make no difference if the premiums were not regularly paid, and it was also attempted to prove a custom of the company to receive payments of overdue premiums, it was held inadmissible to obligate the company to receive premiums after the death of the assured;<sup>220</sup> and it is declared that neither a clerk nor an agent authorized to solicit insurance and renewal of policies can waive payment on the contract.<sup>221</sup> It is also held that an agent, with authority to issue policies and receive premium notes, cannot waive a forfeiture for nonpayment of said notes

<sup>215</sup> *Schmidt v. Charter Oak L. Ins. Co.*, 2 Mo. App. 339.

<sup>216</sup> *Trustees of Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y. 305.

<sup>217</sup> *Church v. Lafayette F. Ins. Co.*, 66 N. Y. 232. That a forfeiture for nonpayment of premium may be dispensed with by the acts or agreement of the agent, see, also, *Hallock v. Commercial Ins. Co.*, 2 Dutch. (26 N. J. L.) 268; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Walsh v. Aetna L. Ins. Co.*, 30 Iowa, 133; *Mississippi Valley L. Ins. Co. v. Neyland*, 9 Bush (Ky.), 430; *Bowman v. Agricultural L. Ins. Co.*, 59 N. Y. 521.

<sup>218</sup> *Bergman v. St. Louis L. Ins. Co.*, 2 Mo. App. 262.

<sup>219</sup> *Nashville L. Ins. Co. v. Ewing*, 58 Tenn. 305.

<sup>220</sup> *Sullivan v. Cotton States L. Ins. Co.*, 43 Ga. 423.

<sup>221</sup> *Hambleton v. Home Ins. Co.*, 6 Bliss. (C. C.) 91, per the Court. See *Waldman v. North British & M. Co.*, 91 Ala. 170; 8 S. Rep. 666; *Kolgers v. Guardian L. Ins. Co.*, 58 Barb. (N. Y.) 185.



at maturity;<sup>222</sup> and that a mere authority to collect premiums does not imply an authority to waive a forfeiture;<sup>223</sup> and that a payment of an overdue premium note to a clerk, who receives the money under protest, does not bind the company;<sup>224</sup> and that local agents with limited powers cannot, even by a course of dealing, waive a provision in renewal certificates that no agent has power to receive premiums after they become due without special authority.<sup>225</sup> And it is held, if the policy states that an agent has no authority to waive forfeitures, that evidence is inadmissible that the general agent had consented to accept the overdue premium and give a receipt.<sup>226</sup> It is decided in Texas<sup>227</sup> that an agent, with authority only to receive applications and collect premiums, and not empowered to make contracts of insurance, cannot waive a forfeiture for nonpayment of premiums by demanding payment thereof when overdue and threatening suit therefor, nor can such agent extend the time of payment of renewal premiums.<sup>228</sup> And the fact that the agent to whom the premium note was given was indebted to the assured, and promises to pay said note to the company, but does not, will not aid the assured when the company sends the assured notice of the time when the note will become due, and states therein that the policy will be avoided if the note is not paid.<sup>229</sup> A waiver cannot be deduced from ambiguous circumstances, and it is also held that neither the consent of a broker nor subagent, with only ordinary authority, can establish a waiver.<sup>230</sup> Where it was provided that if the premium note was not paid at maturity the policy should become void, and that the full amount of the premium should be considered as earned, it was held that an agreement by the

<sup>222</sup> *Wall v. Home Ins. Co.*, 8 Bosw. (N. Y.) 597.

<sup>223</sup> *Union Mut. L. Ins. Co. v. McMullen*, 24 Ohio St. 67.

<sup>224</sup> *Muhleman v. National Ins. Co.*, 6 W. Va. 508.

<sup>225</sup> *Lewis v. Phoenix etc. L. Ins. Co.*, 44 Conn. 72. See *Brown v. National Mut. L. Ins. Co.*, 59 N. H. 298.

<sup>226</sup> *Caton v. American Trust Co.*, 83 N. J. 487. But examine secs. 438, 439.

<sup>227</sup> *Cohen v. Continental Ins. Co.*, 67 Tex. 325; 3 S. W. Rep. 296.

<sup>228</sup> *Critchett v. American Ins. Co.*, 53 Iowa, 404; 36 Am. Rep. 230.

<sup>229</sup> *Ferebee v. North Carolina Home Ins. Co.*, 68 N. C. 11.

<sup>230</sup> *Continental Ins. Co. v. Willets*, 24 Mich. 268; *Marland v. Royal Ins. Co.*, 71 Pa. St. 393. See preceding sections in this chapter.

agent of the company that the note might lie over a few days, did not operate to continue or revive the policy, but was merely an agreement not to press payment of the note.<sup>231</sup> In another case, one who acted merely as an insurance broker received a note for a portion of the premium, which note provided that the policy would become void if the note were not paid at maturity, which condition, as to forfeiture, was also contained in the policy. Receipt of the payment of the first premium was also acknowledged therein. The policy was subsequently assigned with the company's consent, "subject to all the conditions" thereof. The note in question was forwarded to the company through its agent in New York. Soon after the assignment the assignee took the policy to the company's agent at Philadelphia, and requested that it be changed, so that payment of premiums could be made quarterly, instead of annually, and at the latter place instead of New York. This agent forwarded the policy to the home office at Boston before the premium became due, but did not hear from it until about a month thereafter. In the mean time the assignee had called at the agent's office on several occasions to pay the premium. The agent stated that he had no authority to receive the same, but would send for renewal receipts, and that the delay should not prejudice her rights. Before the reply was received to the agent's letter, the assured died. The premium note was unpaid when due, and of this fact the Philadelphia agent knew nothing. It was decided that under the assignment the company could set up the forfeiture as well against the assignee as the assured; that the former had no right to rely upon the belief that the first premium had been paid in cash; that no waiver arose either from the retention of the notes by the company, nor its delay in answering its agent's letter, nor from the agent's acts.<sup>232</sup> So in another case, after the local agent of a benevolent society had returned the receipt for nonpayment of assessments, the secretary again forwarded them to the agent for collection, mentioning a day certain beyond which the time of payment would not be extended. Payment not being made within the period specified, ten days thereafter the agent

<sup>231</sup> *Wall v. Home Ins. Co.*, 8 Bosw. (N. Y.) 597; 36 N. Y. 157.

<sup>232</sup> *How v. Union Mut. L. Ins. Co.*, 80 N. Y. 32.

forwarded the money to the company which he had collected by contributions from friends of the assured. The society refused to receive the money, and it was returned to the donors. Upon an action against the company, it was held that the forfeiture was not waived.<sup>233</sup> And it is held that though an agent has power to make the contract of insurance and receive the premium, he has no authority, without an express authorization, to bind the company by receiving it after it becomes due;<sup>234</sup> and that a general agent may not waive such a condition where such exercise of authority is prohibited by the policy.<sup>235</sup> It is also declared that a collecting agent has no power to waive a forfeiture or bind the company by the receipt of overdue premiums, there being no evidence that the agent had possessed or before attempted to exercise such authority, and the policy also providing that no agent can waive forfeiture except in a certain manner.<sup>236</sup> The question, however, in relation to premiums must rest upon the apparent authority of the agent and the question whether the insured had actually or constructively notice of any limitations on the agent's powers.<sup>237</sup>

**§ 556. Agent's Powers—Other Insurance.—Waiver.—**

An agent may waive a condition as to other insurance although the policy requires that the consent of the company be written on the policy;<sup>238</sup> and although there be such provisions in the policy, the company is estopped to deny consent to other insurance where the policy was given its agent for the purpose of having such consent indorsed thereon, and the other insurance was requested by the agent,<sup>239</sup> and notice of such insurance is

<sup>233</sup> *Illinois Masons B. Soc.*, 86 Ill. 479.

<sup>234</sup> *Bonton v. American Mut. L. Ins. Co.*, 25 Conn. 542.

<sup>235</sup> *Marvin v. Universal L. Ins. Co.*, 85 N. Y. 278. See *New York L. Ins. Co. v. Fletcher*, 117 U. S. 519.

<sup>236</sup> *Metropolitan L. Ins. Co. v. McGrath*, 52 N. J. L. 358; 19 Atl. Rep. 386. See *Mesereau v. Phoenix Mut. L. Ins. Co.*, 66 N. Y. 274. As to brokers' powers to waive prepayment of premium, see *Pottsville Mut. Ins. Co. v. Minnequa etc. Co.*, 100 Pa. St. 137.

<sup>237</sup> See chapter xviii.

<sup>238</sup> *Iycoming Ins. Co. v. Barringer*, 73 Ill. 230.

<sup>239</sup> *Cobb v. Insurance Co. of North America*, 11 Kan. 98.

sufficient if given to the agent who effects the policy.<sup>240</sup> So in another case, where the policy stipulated that consent to other insurance must be indorsed thereon, it was held that such provision could be orally waived by the company's agent.<sup>241</sup> And the declarations of an agent that a second insurance had been indorsed on the first policy estops the company from objecting to the want of an indorsement.<sup>242</sup> So the company is bound if the agent has notice and neglects to indorse it on the policy.<sup>243</sup> There is also an estoppel against the company where the agent receives the policy to do what is necessary concerning additional insurance, and he afterward returns the same, saying it is all right, although such insurance was not in fact indorsed or otherwise acknowledged in writing on the policy as required by the by-laws, the company being a mutual one;<sup>244</sup> and where the agent had acted in canceling and substituting policies for the assured, and so had full knowledge of the existence of other insurance, there was held to be a waiver of the condition against other insurance, and that the company was estopped to deny the same.<sup>245</sup> So in case of a foreign company the local agent, in the absence of special limitations upon his powers, may waive a condition in the policy against other insurance, even though the policy provides for indorsement thereon of a specific agreement.<sup>246</sup> So an estoppel to deny consent to such insurance will arise where after the loss the agent, knowing of other insurance, requires proof of loss, etc., at a great expense to assured;<sup>247</sup> and where the agent was informed of other insurance on the property, and did not object, but promised to indorse it thereon, and the assured relied upon his agreement, and just before loss the agent arranged to renew the policy and made a memorandum thereof, but never in-

<sup>240</sup> *Hayward v. National Ins. Co.*, 52 Mo. 181.

<sup>241</sup> *Liverpool etc. Ins. Co. v. Sheffy* (Miss. 1895), 16 S. Rep. 307.

<sup>242</sup> *Mentz v. Lancaster F. Ins. Co.*, 79 Pa. St. 475.

<sup>243</sup> *National Ins. Co. v. Crane*, 16 Md. 260; *New England F. & M. Ins. Co. v. Schettler*, 38 Ill. 166.

<sup>244</sup> *Redstrake v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 294.

<sup>245</sup> *Hadley v. New Hampshire F. Ins. Co.*, 55 N. H. 110.

<sup>246</sup> *Goldwater v. Liverpool etc. Ins. Co.*, 39 Hun (N. Y.), 176; 12 Cent. Rep. 49.

<sup>247</sup> *Webster v. Phoenix Ins. Co.*, 36 Wis. 67.

dorsed the same, it was held that the company was bound, even though the policy provided that there could be no waiver, by any agent except by distinct agreement contained in the body of the policy.<sup>248</sup> And where all the companies are represented by the same agent, and he delivers the policies, there is a sufficient notice of other insurance.<sup>249</sup> So a general agent has authority to indorse permission on the policy for other insurance "without notice," and insurance effected by him after he has so done does not work a forfeiture;<sup>250</sup> and where the agent informed his company that if it could not take the whole risk he would place a portion in some other company, which was done, and thereafter the agent indorsed his consent to other insurance on the policy, it was held, after the loss, to be a sufficient notice to the company,<sup>251</sup> and the knowledge of the agent is that of the company where he procures the first policy and afterward effects other insurance in another company.<sup>252</sup> So where the agent who issued the policy had issued the other insurance, and had requested the insured to take out additional insurance, his knowledge binds the company.<sup>253</sup> So an agent authorized to make and revoke contracts of insurance may bind the company by receiving notice,<sup>254</sup> and if the agent at the time of issuing the policy knew of other insurance on the property, and did not object on that account to issuing it and receiving the premium, this will waive the condition against other insurance.<sup>255</sup> So if a policy mentions a prior insurance, this is sufficient notice, although it provides that consent to such insurances must be given by the directors, and indorsed on the policy under the hand of the president and secretary, nor is further notice necessary for its renewal in such case,<sup>256</sup> and

<sup>248</sup> *Morrison v. Insurance Co. of North America*, 69 Tex. 353; 6 S. W. Rep. 605.

<sup>249</sup> *Insurance Co. of North America v. McDowell*, 50 Ill. 120.

<sup>250</sup> *Warner v. Peoria etc. Ins. Co.*, 14 Wis. 318.

<sup>251</sup> *Farmers' Mut. Ins. Co. v. Taylor*, 73 Pa. St. 342.

<sup>252</sup> *Von Boires v. United etc. Ins. Co.*, 8 Bush (Ky.), 133. See, also, *Brandup v. St. Paul F. & M. Ins. Co.*, 27 Minn. 393; *Russell v. State Ins. Co.*, 55 Mo. 585.

<sup>253</sup> *Home Ins. Co. v. Wood*, 47 Kan. 521; 28 Pac. Rep. 167.

<sup>254</sup> *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253.

<sup>255</sup> *Lycoming Ins. Co. v. Barringer*, 73 Ill. 230.

<sup>256</sup> *First Baptist Soc. v. Hillsborough Mut. F. Co.*, 19 N. H. 530.

the agent's knowledge in this respect binds the company, even though consent to other insurance be not indorsed upon the policy as required thereon. In such cases there is a waiver or estoppel as against the company.<sup>257</sup> So the company is bound where its local agent examines other policies on the same property.<sup>258</sup> So notice of another insurance given to the agent, and his consent thereto, express or implied, binds the principal. This is so in case notice is given to a local agent of a foreign company,<sup>259</sup> or where notice of prior insurance is given to an agent authorized to make surveys and receive applications, or to a soliciting agent authorized to negotiate contracts of insurance.<sup>260</sup> And the same is true of an oral notice.<sup>261</sup> And the rule applies to a local agent,<sup>262</sup> and an agent to take and revoke risks may consent to a prior or subsequent insurance on the property;<sup>263</sup> and the knowledge of an agent of such insurance at the time of the issue of renewal policies estops the company.<sup>264</sup> Where the same persons are directors of both insuring companies, and examine the applications, there is an estoppel to deny notice or consent, notwithstanding the

<sup>257</sup> *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422; *Goodall v. N. E. Mut. Ins. Co.*, 25 N. H. 169; *Kenton Ins. Co. v. Shea*, 6 Bush (Ky.), 174; *National Ins. Co. v. Crane*, 16 Md. 260; *Gelb v. International Ins. Co.*, 1 Dill. (U. S.) 443; *Carrugi v. Atlantic F. Ins. Co.*, 40 Ga. 135; 2 Am. Rep. 567; *Hadley v. New Hampshire F. Ins. Co.*, 55 N. H. 110.

<sup>258</sup> *Pechner v. Phoenix Ins. Co.*, 6 Lans. (N. Y.) 411.

<sup>259</sup> *Goldwater v. Liverpool etc. Ins. Co.*, 39 Hun (N. Y.), 176.

<sup>260</sup> *Pelkington v. National Ins. Co.*, 55 Mo. 172; *Gelb v. International Ins. Co.*, 1 Dill. (C. C.), 443; *Sheldon v. Atlantic Ins. Co.*, 26 N. Y. 480; *Schenck v. Mercer etc. Ins. Co.*, 24 N. J. L. (4 Zab.) 447; *Van Bories v. United etc. Co.*, 8 Bush (Ky.), 133; *Wood v. Poughkeepsie Ins. Co.*, 32 N. Y. 619; *Insurance Co. of North America v. McDowell*, 50 Ill. 120; *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292; *Hayward v. National Ins. Co.*, 52 Mo. 181; *Hamilton v. Home Ins. Co.*, 94 Mo. 353; *McEwen v. Montgomery Co. Mut. Ins. Co.*, 5 Hill (N. Y.), 101; *Kenton Ins. Co. v. Shea*, 6 Bush (Ky.), 174; *American Ins. Co. v. Gallatin*, 48 Wis. 36, *Ryan, C. J.*, dissenting.

<sup>261</sup> *Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. (N. Y.) 511; *Schenck v. Mercer Co. Mut. F. Ins. Co.*, 24 N. J. L. (4 Zab.) 447; *Sexton v. Montgomery Co. Ins. Co.*, 9 Barb. (N. Y.) 191.

<sup>262</sup> *Phoenix Ins. Co. v. Splers*, 87 Ky. 286; 8 S. W. Rep. 453.

<sup>263</sup> *Carrugi v. Atlantic F. Ins. Co.*, 40 Ga. 135; 2 Am. Rep. 567.

<sup>264</sup> *Carroll v. Charter Oak Ins. Co.*, 40 Barb. (N. Y.) 292; 38 Barb. (N. Y.) 402; *Carrugi v. Atlantic F. Ins. Co.*, 40 Ga. 135; 2 Am. Rep. 567.

policy provides that notice be given the secretary and the directors' consent obtained.<sup>265</sup> And where application is made to the agents for a certain amount of insurance, of which they do not take all, but the assured procures the balance and notifies the agents immediately, the company is bound by the notice, although the policy provides for a written indorsement of consent.<sup>266</sup> So notice of additional insurance may before receipt of the policy be given to an agent of the insurer who effected the insurance, and to whom the policy was given for delivery, and the indorsement of such additional insurance on the policy by the agent is the act and assent of the company.<sup>267</sup> And in case of a mutual company, where it appeared that a member informed the agent that he had effected other insurance, and the agent replied that it was all right, the company was held bound. It further appeared in this case that one of the additional policies was afterward canceled, and another written for the same amount in another company, and the agent told the assured that notice of such substitution was unnecessary and it was held that the notice to the agent was notice to the company;<sup>268</sup> and there is a valid consent to other insurance where the secretary of the company acknowledges by letter that notice thereof is received, for in such case the assured has the right to assume an approval by the company.<sup>269</sup> But it is held that a mere soliciting agent cannot waive a condition relative to additional insurance.<sup>270</sup> Nor is the company bound by an agreement between the agent and subagent that additional insurance, when applied for, should be divided between defendant and two other companies for which the general agent was also acting.<sup>271</sup>

§ 557. **Broker—Other Insurance—Waiver.**—It is declared in a New York case<sup>272</sup> that if an agent be considered a

<sup>265</sup> *Goodall v. New England Mut. F. Ins. Co.*, 25 N. H. 169.

<sup>266</sup> *Horwitz v. Equitable Mut. Ins. Co.*, 40 Mo. 557.

<sup>267</sup> *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; 15 Am. Rep. 612.

<sup>268</sup> *Combs v. Shrewsbury Mut. F. Ins. Co.*, 34 N. J. Eq. 403.

<sup>269</sup> *Potter v. Ontario Mut. Ins. Co.*, 5 Hill (N. Y.). 147.

<sup>270</sup> *Phoenix Ins. Co. v. Copeland*, 90 Ala. 386; 8 S. Rep. 48.

<sup>271</sup> *Blake v. Hamburg-Bremen F. Ins. Co.*, 67 Tex. 160; 2 S. W. Rep. 368.

<sup>272</sup> *Arff v. Starr F. Ins. Co.*, 125 N. Y. 57; 25 N. E. Rep. 1073; cited

mere insurance broker, a forfeiture is not saved by notice to him of other insurance;<sup>273</sup> but the agent, however, in that case was found to be a clerk of the company's agent, and it was held, therefore, that notice to him of other insurance was sufficient to bind the company. On the same line with this intimation of the court is another case in the same state, where it is held that the mere employment of the same broker who procured the first policy to obtain other insurance in another company does not operate as constructive notice to the insurer issuing the original policy, where the condition therein requires that notice of other insurance be given with all reasonable diligence to the company.<sup>274</sup>

**§ 558. Agent—Other Insurance—Where no Waiver—Cases.**—It is held that where the policy requires that prior insurance must be mentioned in or indorsed thereon, a verbal notice of prior insurance is insufficient when given to the agent of the company issuing the second policy, although he makes a memorandum thereof in a book of his own wherein are other entries concerning insurance matters.<sup>275</sup> It is also decided that notice of such insurance to the agent at the time the policy is issued does not estop the company, unless the agent is a general agent, with full power to make contracts, and not an agent to receive and forward applications.<sup>276</sup> So where the applicant told the agent that he intended to take an additional insurance, and the agent expressed a desire to write the policy, but thereafter he took out such insurance without the agent's knowledge, the first policy was held invalidated.<sup>277</sup> It is also held that the insured must be deemed to have knowledge of the

in *More v. New York Bowery F. Ins. Co.*, 130 N. Y. 537, 548; 29 N. E. Rep. 760.

<sup>273</sup> See, also, *Devens v. Insurance Co.*, 83 N. Y. 168.

<sup>274</sup> *Mellen v. Hamilton F. Ins. Co.*, 5 Duer (N. Y.), 101; 17 N. Y. 609. See secs. 413, 414.

<sup>275</sup> *Pendar v. American etc. Ins. Co.*, 12 Cush. (Mass.) 469; *Cleaver v. Insurance Co.*, 65 Mich. 527.

<sup>276</sup> *Reed v. Equitable F. & M. Ins. Co.*, 17 R. I. 785; 24 Atl. Rep. 833; *Hamilton v. Aurora Ins. Co.*, 15 Mo. App. 59. But see *Saxton v. Montgomery Ins. Co.*, 9 Barb. (N. Y.) 191.

<sup>277</sup> *New Orleans Ins. Assn. v. Griffin*, 66 Tex. 232; 18 S. W. Rep. 505.



conditions of his contract of insurance, even though he has never seen the policy, where no adequate reason is shown why he could not have seen it, had he so desired, and that a forfeiture by taking additional insurance contrary to the condition of the policy is not saved by proof that the agent had authority, in a certain manner, to consent to additional insurance, and had done so in other cases, where it is not shown that he consented in assured's case, within the line of his authority or in the manner prescribed in the policy, or that he was authorized to waive any of its conditions. But a forfeiture of a policy, by taking additional insurance in violation of its conditions, may be waived by the company where, with knowledge of the forfeiture, and supposing it to be waived, it fails to notify assured of its intention to insist on the forfeiture until after its adjuster has visited the insured and obtained from him all the information asked for in relation to the extent and value of his loss. Such action by the company will warrant the jury in finding a waiver of forfeiture, and that question should be submitted to it.<sup>278</sup> In another case it is ruled that knowledge of an agent of subsequent insurance, or of a change in existing insurance, is not notice to the company where the policy provides for notice in writing, acknowledged by the secretary.<sup>279</sup> It is also decided that a subagent authorized to solicit applications, receive premiums, and deliver policies cannot consent to additional insurance in other companies, and that notice to him of such insurance does not bind the company,<sup>280</sup> and that where a by-law of a mutual company provides for the consent of the directors to other insurance, its agent cannot obligate the company by consenting to a second policy.<sup>281</sup> If the by-laws provide that consent of the directors to other insurance be set forth in the policy, or for an indorsement signed by the secretary, it is not sufficient if the consent of one director be indorsed on

<sup>278</sup> *Cleaver v. Traders' Ins. Co.*, 71 Mich. 414; 15 Am. St. Rep. 275; 39 N. W. Rep. 571; 65 Mich. 527.

<sup>279</sup> *Commonwealth Mut. F. Ins. Co. v. Huntzinger*, 98 Pa. St. 41. See, also, *Warwick v. Monmouth Co. Mut. F. Ins. Co.*, 44 N. J. L. (15 Vroom) 83; 43 Am. Rep. 343.

<sup>280</sup> *Heath v. Springfield F. Ins. Co.*, 58 N. H. 414.

<sup>281</sup> *Behler v. German Mut. F. Ins. Co.*, 68 Ind. 347.

the application.<sup>282</sup> So consent by a director or secretary is not sufficient where the charter and by-laws provide for consent to other insurance by the president and secretary;<sup>283</sup> and where upon the evidence it appears that the persons to whom the notice of such insurance was given had no authority to act for the company in any way, and the policy provides for indorsement of prior insurance on the property, and, in case of subsequent insurance, that notice thereof be given with reasonable diligence, and be also indorsed on the policy, notice to such person of other insurance is insufficient,<sup>284</sup> and it is held inadmissible to show consent to other insurance by evidence other than that of indorsement on the policy, signed by the secretary, where the company's charter provides for such manner of consent.<sup>285</sup> So if the policy be seen by the general agent, and thereafter another agent in another place consents to other insurance, the latter's authority to so consent must be proved.<sup>286</sup> Where a policy of insurance provided that it should be void for additional insurance not consented to by the company in writing on the policy, and the agent of the company, in reply to a letter of the insured, wrote him stating that the company would allow other concurrent insurance and would place it for him at the same rate, it was held that this did not waive the condition of the policy, as it was not a consent to specific additional insurance and was a mere revocable offer.<sup>287</sup>

**§ 559. Agent's Powers—Change of Risk—Waiver.—**

An agent's power extends to a waiver of forfeiture for change of risk where he is authorized to arrange the terms upon which such change may be made.<sup>288</sup> So a foreign company will be bound by a notice of a misappropriation of the premises given to its resident agent,<sup>289</sup> and if an agent has power to cancel pol-

<sup>282</sup> *Forbes v. Agawam Mut. F. Ins. Co.*, 9 Cush. (Mass.) 470.

<sup>283</sup> *Stark Co. Mut. Ins. Co. v. Hurd*, 19 Ohio, 149.

<sup>284</sup> *Gilbert v. Phoenix Ins. Co.*, 36 Barb. (N. Y.) 372.

<sup>285</sup> *Crouch v. City F. Ins. Co.*, 38 Conn. 181.

<sup>286</sup> So held in *Security Ins. Co. v. Fay*, 22 Mich. 467.

<sup>287</sup> *Alemannia F. Ins. Co. v. Hurd*, 37 Mich. 11; 26 Am. Rep. 491.

<sup>288</sup> *North Berwick Co. v. New England F. & M. Ins. Co.*, 52 Me. 336.

<sup>289</sup> *Keenan v. Missouri etc. Ins. Co.*, 12 Iowa, 126.

icies for increase of risk, he may waive a forfeiture therefor.<sup>290</sup> And notice to a general agent of the erection of a new building renders the company liable for the destruction of the insured property by a fire, communicated thereto from the new one, where the agent, upon being informed thereof stated that such erection would not increase the risk nor affect the insurance.<sup>291</sup> So where the agent stated to the assured after the risk had attached that putting in rope machinery would not be a breach of condition against an increase of risk, the policy is not invalidated;<sup>292</sup> nor does a change of residence vitiate the policy where the local agent, upon being notified thereof, said it would not avoid the policy if the premiums were promptly paid.<sup>293</sup> And where the circumstances under which the insurance was obtained are such as to induce the belief by the assured that one is the agent of the company, he has authority to waive written assent to material alterations in the property, as where such party, being applied to for insurance, wrote the application, and it was forwarded to the company with his name thereon as agent, and the company issued the policy and wrote his name on the back, and sent it to him to deliver, and the premium was received through him.<sup>294</sup> But it is held that a local agent only authorized to receive premiums and issue policies cannot waive conditions requiring the company's assent to a change of risk;<sup>295</sup> and that an agent's knowledge of the making of a lease does not put the company on inquiry as to any other rights in property, such as the privilege of the lessee to buy the same.<sup>296</sup>

**§ 560. Agent's Power — Alienation — Assignment — Waiver.**—An agent may waive a forfeiture for a transfer of

<sup>290</sup> *Viele v. Germania Ins. Co.*, 26 Iowa, 9.

<sup>291</sup> *King v. Council Bluffs Ins. Co.* (Iowa), 33 N. W. Rep. 690.

<sup>292</sup> *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 218.

<sup>293</sup> *Wing v. Harvey*, 27 Eng. L. & Eq. 140.

<sup>294</sup> *Packard v. Dorchester Mut. F. Ins. Co.*, 77 Me. 144. See, also, as to increase of risk and waiver by agent, *Warner v. Peoria M. & F. Ins. Co.*, 14 Wis. 318.

<sup>295</sup> *Kyte v. Commercial Union Assur. Co.*, 144 Mass. 43.

<sup>296</sup> *Fire Assn. of Philadelphia v. Flourney*, 84 Tex. 632; 19 S. W. Rep. 793.

the property by assenting thereto and renewing the policy after the conveyance is made.<sup>297</sup> So the company is bound by the promise of its agent to indorse consent on the policy to a conveyance of the property and his agreement that the contract should be valid until the policy was brought from another city, and the proper indorsement made, and the property was purchased by one who relied on such promise.<sup>298</sup> And where the directors knew that an agent had consented to an assignment of the policy, and duly recorded the same upon their register, the company is obligated thereby;<sup>299</sup> and an agent with apparent authority may generally consent to an alienation, and a waiver of forfeiture will exist.<sup>300</sup> So an agent may agree that the policy remain in force, notwithstanding a transfer and sale of the property insured, and a condition that consent thereto must be indorsed on the policy.<sup>301</sup> In another case a policy of insurance issued to a mortgagee contained a stipulation that if any change took place in the title or possession the policy should be void. Without the knowledge of the company the owner sold and conveyed the property, and satisfied the mortgage, and it was decided that a subsequent assignment of the policy by the mortgagee to the purchaser, and a verbal agreement between the latter and an agent of the company having power to make contracts and issue policies that such assigned policy should have the force and effect of a new policy to the purchaser, would bind the company.<sup>302</sup> So the company is bound by the statement of the agent that a sale and mortgage of the property would be all right, notwithstanding the policy provides that nothing but a distinct, specific agreement indorsed on the policy shall be valid, and that the agent shall

<sup>297</sup> *Shearman v. Niagara F. Ins. Co.*, 46 N. Y. 526; 7 Am. Rep. 330. See *Buchanan v. Exchange etc. Ins. Co.*, 61 N. Y. 26; *Fire Ins. Co. v. Miller*, 2 Tex. Civ. Cas. 333. Examine *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317.

<sup>298</sup> *Illinois F. Ins. Co. v. Statton*, 57 Ill. 351. But see *Equitable Ins. Co. v. Cooper*, 60 Ill. 509.

<sup>299</sup> *Duray v. Hudson County Ins. Co.*, 24 N. J. L. (4 Zab.) 171.

<sup>300</sup> *Fire Ins. Co. v. Building Assn.*, 43 N. J. L. (14 Vroom) 652.

<sup>301</sup> *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352, 356; 50 N. W. Rep. 240.

<sup>302</sup> *Amazon Ins. Co. v. Wall*, 31 Ohio St. 628; 27 Am. Rep. 533.

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be deemed the agent of the assured. In this case the policy was procured through the duly authorized agent of the company, who countersigned it as such, and it was three times renewed; each receipt, signed by the president and secretary, providing that it was not valid unless countersigned by the defendant's duly authorized agent, and being signed by said agent, he receiving the premiums and transmitting them to the defendant; and the information as to sale and mortgage was given said agent on the third renewal, and the agent's declaration that it was all right was then made,<sup>303</sup> and where the transfer is made and the agent consents to the necessary assignment of the policy, and the company neglects to object thereto, there is a waiver.<sup>304</sup> So in case a policy of fire insurance is forfeited by a change in the title of the insured property, and the agent of the insurers informs the person for whose benefit the policy was issued that the policy will be allowed to stand, the insurers cannot after a loss by fire elect to declare the policy void.<sup>305</sup> A policy is not avoided by the sale of the land upon which the insured buildings are located where the agent knows thereof and makes indorsements on policy with reference thereto;<sup>306</sup> and although the policy requires on its face a written approval of a transfer, the company is estopped from insisting upon such requirement where the agent assures the insured that a written approval is unnecessary.<sup>307</sup> Where the agent, at the time he promised to re-insure the property and receive the new premium therefor, knew of the purchase and sale of the property, and that the pol-

<sup>303</sup> *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415; 32 Am. Rep. 330.

<sup>304</sup> *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 405.

<sup>305</sup> *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505; 14 Am. Rep. 804. In this case it appeared that plaintiff, who had a mortgage interest in property, applied to defendant's agent for an insurance thereon. The form of the policy was left to the judgment of the agent, who made out a policy to the mortgagors, payable to plaintiff in case of loss. The policy contained a condition that a change in the title of the property, without defendant's written consent, would avoid the policy. The mortgage was subsequently foreclosed and plaintiff became the purchaser. Plaintiff informed the agent of the change in title and was told that the policy might stand.

<sup>306</sup> *Bonenfant v. Insurance Co.*, 76 Mich. 653; 43 N. W. Rep. 682.

<sup>307</sup> *Stolle v. Aetna F. & M. Ins. Co.*, 10 W. Va. 546.

icy had not been assigned, his promise and knowledge is that of the company, and the agent will be presumed to have authority to so agree in the absence of proof to the contrary.<sup>308</sup> So an indorsement by an agent on the policy, after knowledge of a conveyance, of consent that a certain person should be payee of the loss may be proven by parol.<sup>309</sup> Again, if the policy requires the company's written consent to an assignment, an indorsement on the policy of such consent, attested by the agent, is sufficient.<sup>310</sup> And where the policy is issued to partners, and provides that if the property is "sold or conveyed without the consent of the company obtained in writing on the policy, it shall be void," a sale by one partner to the other avoids the policy; but if after such sale the purchaser, supposing the policy to be still in force, and desiring to assign it to a third party, applies to the company through its agent for its consent, and upon communicating the facts attending his purchase obtains the consent of the company in writing to the assignment, and that the loss, if any, should be paid to the assignee, this constitutes a waiver of the forfeiture, and continues the policy in force. Such consent and waiver may be made by the agent of the company without communication with his principal.<sup>311</sup> If the president indorses consent to an assignment on a separate piece of paper, and it is attached to the policy by a wafer, such indorsement binds the company where the policy requires consent to an assignment to be indorsed by the secretary or other officer;<sup>312</sup> and the president has authority to consent to a transfer of the policy where the articles of incorporation provide that he or the secretary, jointly or separately, shall sign or indorse all commercial paper and all contracts or written instruments.<sup>313</sup> If an agent uses such language as reasonably leads the assured to believe that the agent had power to consent to an alienation of the property, and the policy contains no re-

<sup>308</sup> *Pierce v. Nashua Ins. Co.*, 50 N. H. 297; 9 Am. Rep. 235. See *Sanders v. Insurance Co.*, 44 N. H. 244.

<sup>309</sup> *Oakes v. Manufacturers' Ins. Co.*, 135 Mass. 248. But see *Bates v. Equitable Ins. Co.*, 10 Wall. (U. S.) 33.

<sup>310</sup> *New Orleans Co. v. Holberg*, 64 Miss. 51.

<sup>311</sup> *Keeler v. Niagara Ins. Co.*, 16 Wis. 523; 84 Am. Dec. 714.

<sup>312</sup> *Pennsylvania Ins. Co. v. Bowman*, 44 Pa. St. 89.

<sup>313</sup> *Glover v. Wells etc.* (Ill. 1892) 29 N. E. Rep. 680.

strictions on the agent's authority, and the assured has no intimation whatsoever of any limitation thereon, and the agent is a general agent, the company is bound by his representations.<sup>314</sup> In another case, the title of the property was transferred to plaintiff March 4th; a renewal was effected March 21st by the insured; on the 15th of April the policy was assigned to plaintiff, who, on the same day, informed the company's agent that the property and policy had been transferred to him and received the company's written consent, signed by the agent. It was held that the renewal after the transfer was valid, and that the consent of defendants to the transfer waived the forfeiture and revived the policy.<sup>315</sup> So although an agent is prohibited by the terms of the policy from waiving its conditions, yet if he has authority to consent to an assignment he may waive forfeiture of a transfer by thereafter consenting to an assignment to the transferee of the property, where the company has immediate notice thereof and neglects to make objection till after a loss.<sup>316</sup> So the acts and declarations of the agent may evidence a waiver of a condition of forfeiture for assignment without consent.<sup>317</sup>

**§ 561. Alienation—Assignment—When Company not Bound by Agent's Acts.**—It is held that an agent has no authority to waive notice of an assignment where he is only authorized to receive applications, transmit policies, and receive premiums.<sup>318</sup> And a mere soliciting agent cannot consent to an assignment of the policy,<sup>319</sup> nor has an agent implied authority to consent to an assignment of the policy where he has only power to receive applications and make them temporarily binding, and to receive premiums on renewals;<sup>320</sup> nor

<sup>314</sup> *Millville F. Ins. Co. v. Mechanics' etc. Assn.*, 43 N. J. L. (14 Vroom) 652.

<sup>315</sup> *Shearman v. Niagara F. Ins. Co.*, 46 N. Y. 526; 7 Am. Rep. 380.

<sup>316</sup> *Benninghoff v. Agricultural Ins. Co.*, 93 N. Y. 495; *Imperial F. Ins. Co. v. Dunham*, 117 Pa. St. 460; 10 Cent. Rep. 575 (agent had power to renew policies).

<sup>317</sup> *Pierce v. Nashua etc. Ins. Co.*, 50 N. H. 297; 9 Am. Rep. 235.

<sup>318</sup> *Tate v. Citizens' etc. Ins. Co.*, 13 Gray (Mass.), 79.

<sup>319</sup> *Strickland v. Council Bluffs Ins. Co.*, 66 Iowa, 466.

<sup>320</sup> *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 315.

is authority to give such consent to be inferred from the fact that such agent was authorized to purchase the necessary books for the record of his business on behalf of the company, in which books his record of such assignment was made, although the person applying for the consent to the assignment may have supposed that such agent had authority to grant such consent.<sup>321</sup> And where the local agent was informed of the transfer, and promised to indorse it on the policy, and thereafter two premiums were paid to the agent, and he changed the policy so as to transfer the insurance in part, it was held that there was no waiver, the policy prohibiting waivers by agents.<sup>322</sup> Nor is the company chargeable with all the consequences of the knowledge of a person, to whom policy money has been paid to be turned over to the assignee, respecting the policy and its assignment, and his alleged fraudulent conduct in connection with it, whether such knowledge was acquired or acts done by him as agent for the company, acting within the scope of his duties, or otherwise.<sup>323</sup> So the company is not liable where the property is sold and the purchaser is requested to bring the policy for the necessary indorsement, and he fails to do so;<sup>324</sup> and the right to subsequently transfer the property cannot arise from a consent of the agent to a former alienation,<sup>325</sup> and an agent cannot bind the company by consenting to an assignment of his own policy.<sup>326</sup> So it is held that a condition against alienation is not waived by the fact that the agent wrote, acknowledged, and witnessed the deed of conveyance.<sup>327</sup> So where A and B, partners, assured as such, and C afterward joined the firm, and before loss A sold out to B and C, taking a chattel mortgage, and the agent, after a loss, said that he supposed the company would pay B's share, this does not constitute a waiver.<sup>328</sup>

<sup>321</sup> *Stringham v. St. Nicholas Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 315.

<sup>322</sup> *Shuggart v. Lycoming F. Ins. Co.*, 55 Cal. 408.

<sup>323</sup> *Northwestern Mut. L. Ins. Co. v. Roth*, 118 Pa. St. 329; 12 A. 283.

<sup>324</sup> *Equitable Ins. Co. v. Cooper*, 60 Ill. 509.

<sup>325</sup> *Moulthrop v. Farmers' Mut. F. Ins. Co.*, 52 Vt. 123.

<sup>326</sup> *Ex parte Hennessy*, 1 Con. & L. 550.

<sup>327</sup> *Lahiff v. Ashuelot Ins. Co.*, 60 N. H. 75.

<sup>328</sup> *Card v. Phoenix Ins. Co.*, 4 Mo. App. 424.



**§ 562. Agent—Keeping Prohibited Articles—Waiver.**

The knowledge of the agent that the assured is keeping interdicted articles, where the prohibition in the policy against such act is printed in small type and difficult to read, and the agent neglects to notify the assured of the stringent character of such conditions, but consents that he may keep the articles, operates as a waiver of the forfeiture.<sup>329</sup> So if the agent knew when the insurance was effected of the use of paints and benzine in the business and on the insured premises, this is knowledge of the company.<sup>330</sup> So the forfeiture is waived where the agent tells the assured that the small amount of petroleum kept by him will make no difference, and the company accepts the premium;<sup>331</sup> and an agent authorized to take risks and issue policies may waive by parol a condition against the use of gasoline by consenting to its use until a change is effected in the manner of lighting the insured premises.<sup>332</sup> So the knowledge of the agent that the assured kept gunpowder in stock and intended to continue to keep it estops the company,<sup>333</sup> and where the use of a steamboiler was known to the agent when the application was made, the company is thereby estopped to avail itself of a prohibition against insuring premises in which steamboilers are used.<sup>334</sup> So where the agent who procured the policy and the general agent both knew at the time the policy was issued, and subsequent agents also knew, of the use of a gasoline stove, which use was prohibited, and took no steps toward cancellation of the policy, such use is waived;<sup>335</sup> and where the agent, with the knowledge of the keeping of gunpowder, renews the policy and accepts the premium, there is a waiver.<sup>336</sup> But if the agent only has authority to solicit in-

<sup>329</sup> *Reaper City Ins. Co. v. Jones*, 62 Ill. 458.

<sup>330</sup> *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425; *Same v. Aetna F. & M. Ins. Co.*, 6 W. Va. 437.

<sup>331</sup> *Kruger v. Western F. & M. Ins. Co.*, 72 Cal. 91; 1 *Rail. & Corp. L. J.* 242.

<sup>332</sup> *Winans v. Alemannia Ins. Co.*, 38 Wis. 342.

<sup>333</sup> *Peoria F. & M. Ins. Co. v. Hall*, 12 Mich. 202.

<sup>334</sup> *Campbell v. Merchants & Farmers' Mut. F. Ins. Co.*, 37 N. H. 35.

<sup>335</sup> *Farmers' etc. Ins. Co. v. Nixon*, 2 Col. App. 265; 30 *Pac. Rep.* 42.

<sup>336</sup> *Reaper City Ins. Co. v. Jones*, 62 Ill. 458.

surances, deliver policies, and receive premiums, his consent that the building might be used as a restaurant, which included the use of a gasoline stove, does not waive a forfeiture for such use of gasoline,<sup>337</sup> and such agent has no power to waive a provision against keeping gunpowder.<sup>338</sup>

**§ 563. Agent's Authority—Encumbrances—Waiver.**

Where a general agent, after receiving notice of the existence of encumbrances, writes a letter to the husband of the assured, recognizing therein the policy as subsisting, and invites proofs of loss, which are furnished, such act and statements of the agent estop the company to insist upon the invalidity of the policy by reason of the encumbrances,<sup>339</sup> and the company is likewise estopped to insist upon the forfeiture clause in case of encumbrances where its agent, with power to make and deliver policies, has notice of existing encumbrances and of an intent to further encumber the property, and agrees to note the fact on the application, although no indorsement thereof is made upon the policy.<sup>340</sup> So if the agent consents in writing that the policy shall continue in force, notwithstanding a mortgage on the property, the company is bound,<sup>341</sup> and a condition of the policy requiring notice to be given the company of encumbrances on property insured is sufficiently complied with where it is shown that its agents had notice thereof, and indorsed on the policy that the loss, if any, would be paid to the persons holding the encumbrances.<sup>342</sup> If the company's soliciting agent asks no questions relative to assured's title at the time of the application, and no references as to title are made by assured, the company is estopped to deny the assured's ownership in the property, even though the policy stipulates that

<sup>337</sup> *Garretson v. Merchants & Bankers' Ins. Co.*, 81 Iowa, 727; 45 N. W. Rep. 1047.

<sup>338</sup> *Bartholomew v. Merchants' F. Ins. Co.*, 25 Iowa, 507.

<sup>339</sup> *Reiner v. Dwelling-House Ins. Co.*, 74 Wis. 89; 42 N. W. Rep. 208.

<sup>340</sup> *Copeland v. Dwelling-House Ins. Co.*, 77 Mich. 554; 43 N. W. Rep. 991.

<sup>341</sup> *Mattocks v. Des Moines Ins. Co.*, 74 Iowa, 233; 37 N. W. Rep. 174.

<sup>342</sup> *Insurance Co. of North America v. McDowell*, 50 Ill. 120; 99 Am. Dec. 497.

it shall be void if the assured's interest be other than the unconditional sole ownership.<sup>343</sup> And where the vendor and vendee of property insured went to the local agent and notified him of the sale and a mortgage back for a part of the purchase price, and an assignment was filled out, which was forwarded to the company, but the latter had no knowledge regarding the mortgage other than that possessed by said agent, the giving of such mortgage does not avoid the policy;<sup>344</sup> and evidence is admissible, without a plea of waiver, to show that the assured told the agent of the existence of a mortgage where the company's answer sets up that the assured concealed from it all knowledge thereof.<sup>345</sup>

**§ 564. Agent's Authority—Encumbrances—When no Waiver.**—It is held that one who is not a general agent cannot waive a condition against encumbering the insured property,<sup>346</sup> and that in case an agent with power to consent to an assignment authorizes the assured to assign his interest, which he does, taking a mortgage for a part of the purchase money, the policy is thereby rendered void.<sup>347</sup> Although the agent is informed that the interest of the assured is that of a mortgagee at the time of making the application, the policy is voided by the creation of a new mortgage after the policy is issued, where it provides that notice of encumbrances shall be given the directors in writing.<sup>348</sup> And where an existing mortgage is paid off and a new one substituted, the local agent orally agreeing to waive the condition against encumbrances, and the policy providing for the written consent of the secretary, there is no waiver.<sup>349</sup> And the statements of the agent, after a second mortgage was placed upon the property, that it

<sup>343</sup> *Hart v. Niagara F. Ins. Co.*, 9 Wash. 620; 24 Ins. L. J. 87; 27 L. R. Annot. 86.

<sup>344</sup> *German Ins. Co. v. York*, 48 Kan. 488; 29 Pac. Rep. 586.

<sup>345</sup> *Crittenden v. Springfield F. & M. Ins. Co.*, 85 Iowa, 652; 52 N. W. Rep. 548.

<sup>346</sup> *Martin v. Farmers' etc. Ins. Co.*, 84 Iowa, 516; 51 N. W. Rep. 29.

<sup>347</sup> *German & American Bank v. Agricultural Ins. Co.*, 8 Mo. App. 401.

<sup>348</sup> *Tarbell v. Vermont Mut. F. Ins. Co.*, 63 Vt. 53; 22 Atl. Rep. 533.

<sup>349</sup> *Haukins v. Rockford Ins. Co.*, 70 Wis. 1; 35 N. W. Rep. 34.

would be all right, does not operate as a waiver of the forfeiture therefor where waiver by an agent is required to be written upon or attached to the policy.<sup>350</sup> So it is held that the policy is voided by an encumbrance, notwithstanding notice to the agent who received the application, where the charter of a mutual company gave it a lien on the insured property and provided that a statement of the encumbrance should appear in the application.<sup>351</sup>

**§ 565. Agent's Authority — Vacant— Unoccupied— Waiver.**—A general agent may consent in the policy to a vacancy for a certain period.<sup>352</sup> Where a policy contains a condition that it shall be void if the building becomes vacant or unoccupied, and also prohibits a change in its conditions by an agent unless consent be given in writing, the company will nevertheless be bound by the declarations of its agent, who issued the policy, that it would be good for thirty days, such declaration being made when informed that the premises had become vacant. It was held, however, that there was not a waiver, but merely a construction of the meaning of the conditions as to vacancy by the agent.<sup>353</sup> So a general agent may orally waive such a condition, notwithstanding the policy requires an indorsement therein of consent thereto.<sup>354</sup> And there is a waiver of such conditions where the agent, upon being informed of the vacancy, says it is all right.<sup>355</sup> So it is held that the knowledge of an agent at the time the insurance is effected that the house is vacant stops the company, the agent in this case having authority to solicit, fill out applications, receive premiums, make surveys, and describe the property;<sup>356</sup> and the

<sup>350</sup> *Rosworth v. Cleary*, 80 Wis. 393; 49 N. W. Rep. 750.

<sup>351</sup> *Smith v. Farmers' etc. Ins. Co.*, 19 Ohio St. 287.

<sup>352</sup> *Continental Ins. Co. v. Ruckman*, 127 Ill. 364.

<sup>353</sup> *Hotchkiss v. Phoenix Ins. Co.*, 76 Wis. 269; 44 N. W. Rep. 1106.

<sup>354</sup> *Walsh v. Hartford F. Ins. Co.*, 9 Hun (N. Y.), 421.

<sup>355</sup> *Palmer v. St. Paul F. & M. Ins. Co.*, 44 Wis. 201.

<sup>356</sup> *Alexander v. Germania F. Ins. Co.*, 5 Thomp. & C. (N. Y.) 208; Hun (N. Y.), 665; 5 N. Y. S. C. 208; reversed, 66 N. Y. 464; 13 Alb. L. J. 247; *Germania L. Ins. Co. v. Klener*, 27 Bradw. (Ill.) 590; *Jordan v. State Ins. Co.*, 64 Iowa, 216; *Sentell v. Oswego Co. F. Ins. Co.*, 16 Hun (N. Y.), 518; *Dodge Co. Mut. Ins. Co. v. Rogers*, 12 Wis. 337. But examine *England v. Westchester F. Ins. Co.*, 81 Wis. 583; 51 N. W. Rep. 954.

policy is not avoided where, upon the building becoming vacant, the assured informed the secretary, and he said the company waived the forfeiture.<sup>357</sup> Where the premises were vacant at the time the policy was effected, it was held no defense to a recovery that the assured then agreed orally with the agent that they should be occupied;<sup>358</sup> but contra where the building was a new dwelling-house to be occupied when completed.<sup>359</sup> And the company is bound where the premises at the time of loss are in the same condition as when insured, although there may have been an intervening occupancy, if such original condition was known at the time to the agent.<sup>360</sup> If the general agent, after a change in the occupancy of an insured building, involving an increase of the risk, consents to the continuance of the policy on condition that an iron door shall be put into the building, but without designating any particular time within which this shall be done, the assured is entitled to a reasonable time to put it in, and if, after the exercise of reasonable diligence to get the door put in, the building is destroyed by fire, the company cannot resist payment of the loss on the ground that the door was not in.<sup>361</sup>

§ 566. **Agent's Authority, when no Waiver.**—Though notice to the agent that the premises were unoccupied and his consent thereto might operate as a waiver, yet it is held that such a waiver does not extend beyond the time of renewal, and that the fact that the premises then continued unoccupied the company was held not liable for a loss.<sup>362</sup> Nor is the company bound by the knowledge of its agent that the house was occupied only as a summer residence, where it afterward became vacant;<sup>363</sup> nor can a recovery be had by the assured where the building remains vacant against the prohibition of the policy, although the agent, with a knowledge of the vacancy, consented to a

<sup>357</sup> *Adams v. Greenwich Ins. Co.*, 9 Hun (N. Y.) 45.

<sup>358</sup> *Kimball v. Aetna Ins. Co.*, 9 Allen (Mass.), 540.

<sup>359</sup> *Lubelsky v. Royal Ins. Co.*, 86 Ala. 530.

<sup>360</sup> *Vanderhoff v. Agricultural Ins. Co.*, 46 Hun (N. Y.), 323.

<sup>361</sup> *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83.

<sup>362</sup> *Hotchkiss v. Home Ins. Co.*, 58 Wis. 297; *Hartford Ins. Co. v. Walsh*, 54 Ill. 164.

<sup>363</sup> *Hermann v. Atlantic F. Ins. Co.*, 85 N. Y. 163.

transfer of the policy.<sup>364</sup> So the policy will become void for vacancy of the building, notwithstanding a notice to the agent, where he only has authority to receive and forward applications, collect premiums, and bind the company on special hazards for a limited period. In this case the condition as to vacancy provided that the policy should become void "where the occupant personally vacates the premises, unless immediate notice be given to this company and additional premium paid." No notice other than that above stated was given, nor was any additional premium paid. It was also declared that it was immaterial that the insured did not know the limited extent of the agent's authority;<sup>365</sup> and although the vacancy is caused by a change of tenants, the company is not bound by its agent's knowledge that the building is occupied by tenants.<sup>366</sup>

**§ 567. Agent's Authority—Cancellation.**—An insurance policy cannot be canceled except by virtue of a power reserved to the company, by a stipulation in the policy or by an extraneous agreement;<sup>367</sup> and, in case there is a beneficiary, then his consent is necessary.<sup>368</sup> So that the company's general agents have no authority to cancel policies and substitute for them policies in other companies without the consent of the insured, and where the insured has no knowledge thereof until after loss, such substituted policies are void;<sup>369</sup> and such acts are invalid, even though the company has become insolvent and they were done to forestall action by the receivers.<sup>370</sup> So there is no cancellation where the agent, although directed to cancel the policy, agrees with the assured that the policy shall be valid until another policy is procured;<sup>371</sup> nor is a cancella-

<sup>364</sup> *North American Ins. Co. v. Garland*, 108 Ill. 220, Craig, J., dissenting.

<sup>365</sup> *Harrison v. City F. Ins. Co.*, 9 Allen (Mass.), 231; 85 Am. Dec. 751.

<sup>366</sup> *Ridge v. Insurance Co.*, 9 Lea (Tenn.), 507.

<sup>367</sup> *Rothschild v. American Cent. Ins. Co.*, 74 Mo. 41; s. c. 41 Am. Rep. 303.

<sup>368</sup> *Knapp v. Homœopathic Mut. L. Ins. Co.*, 117 U. S. 411; *Chace v. Insurance Co.*, 67 Me. 85.

<sup>369</sup> *London L. F. Ins. Co. v. Turnbull*, 86 Ky. 230; 5 S. W. Rep. 542.

<sup>370</sup> *United States F. & M. Ins. Co. v. Tardy*, 2 Ins. L. J. 673.

<sup>371</sup> *Golt v. National Protection Ins. Co.*, 25 Barb. (N. Y.) 189.

tion effected by a notice given the agent by the company to cancel and return the policy where such instructions are unknown to the assured,<sup>372</sup> although it is held that a notice of cancellation given the agent will bind the assured from the time he learns thereof.<sup>373</sup> A request by the insured to cancel, made under the provisions of the policy or a statute, may be made to any agent with the requisite authority to act in the matter, and it may be sent by mail or otherwise, provided, however, it reaches such agent.<sup>374</sup> In another case the local agent, being instructed by the general agent to cancel the policy, sent the assured a canceling card, and stated in a letter inclosing the same that he had the unearned premium, subject to the assured's order. Before the letter was received the local agent told the assured not to mind the card, but he would carry the risk until he heard from him again. Thereafter, the local agent was requested by the assured to transfer the policy to another company; a loss, however, occurred before it was done. It was decided that there was no cancellation.<sup>375</sup> Again, it was held that the company was liable where the plaintiff, upon the representations of defendant's agent that the policy had been canceled and one in another company substituted, assented to the substitution and gave a receipt for the unearned premium. But he never received the latter, nor was another policy substituted.<sup>376</sup> The directors of a company have the right to cancel a policy where a by-law gives the company such right, or where, by virtue of the articles of incorporation and by-laws, they have the right to recover overdue assessments or to annul the policy.<sup>377</sup>

§ 568. **Agent's Authority—Removal of Property.**—The company is bound by the knowledge of the agent as to a removal or change of location of the goods.<sup>378</sup> The consent of an

<sup>372</sup> Watertown F. Ins. Co. v. Rust, 141 Ill. 85; 30 N. E. Rep. 772.

<sup>373</sup> Springfield F. & M. Ins. Co. v. McKinnon, 59 Tex. 507.

<sup>374</sup> Crown Point Iron Co. v. Aetna Ins. Co., 127 N. Y. 608.

<sup>375</sup> Aetna Ins. Co. v. Maguire, 51 Ill. 342.

<sup>376</sup> Holden v. Putnam F. Ins. Co., 46 N. Y. 1; 7 Am. Rep. 287.

<sup>377</sup> Coles v. Iowa State Mut. Ins. Co., 18 Iowa, 425; Emmott v. Slater Mut. F. Ins. Co., 7 R. I. 562.

<sup>378</sup> Ludwig v. Jersey City Ins. Co., 48 N. Y. 379.

agent that property may be removed to another building in which "hazardous" articles are stored, and his agreement to make the proper indorsement on the policy which he takes for that purpose, and to continue it in force notwithstanding such storage, constitutes a waiver by the company of a condition voiding the policy if "hazardous" articles should be stored in the building without the company's consent indorsed on the policy.<sup>379</sup> So where the agent consents in writing to the removal of the building and receives an additional premium therefor, which the company retains, it is estopped to deny the agent's authority to so consent.<sup>380</sup> And where the secretary of the company indorsed on the policy and signed a memorandum transferring it to cover similar property in another store, the insured intending to remove the goods insured in such store, the company is liable, even though the goods are destroyed by fire before removal.<sup>381</sup> But it is held that a special agent whose authority is limited to receiving and forwarding applications, delivering policies, and receiving premiums cannot consent to the removal of a part of the property without written notice as required by the policy, and that the fact that a calendar was furnished the agent with his name thereon as "agent," and which contained an account of the company's financial standing, did not confer any additional authority upon him to waive such condition.<sup>382</sup>

<sup>379</sup> *Rathbone v. City etc. Ins. Co.*, 31 Conn. 193.

<sup>380</sup> *New England F. & M. Ins. Co. v. Schettler*, 38 Ill. 166.

<sup>381</sup> *Kunzee v. American Ex. Ins. Co.*, 41 N. Y. 412.

<sup>382</sup> *Putnam Tool Co. v. Fitchburg*, 145 Mass. 265; *Mutual F. Ins. Co.*, 13 N. E. Rep. 502.



## CHAPTER XXI.

### AGENTS OF INSURER—POWERS—THE LOSS.

- § 575. Agent's authority: Notice of loss.
- § 576. Agent's authority: What is not sufficient notice of loss.
- § 577. Misstatements by agent in proofs of loss—Estoppel.
- § 578. Where agent aids in preparing proofs of loss—Waiver.
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- § 594. Fraud of agent inducing settlement—Waiver: Proofs of loss.
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- § 603. Abandonment to insurer's agent.

§ 575. **Agent's Authority—Notice of Loss.**—Notice of loss to the proper agent is notice to the insurer.<sup>1</sup> So verbal notice to the agent is held sufficient,<sup>2</sup> and where a policy of fire in-

<sup>1</sup> *Bennett v. Maryland Ins. Co.*, 14 Blatchf. (C. C.) 422. See *People's Ins. Co. v. Spencer*, 53 Pa. St. 353.

<sup>2</sup> *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472.

insurance requires that the insured shall give immediate notice in case of loss, and the loss is made payable to a mortgagee, notice by the mortgagee and assignee of all the interest of the insured to the local agent is valid, if knowledge of it comes to the general agent.<sup>3</sup> So service of notice and proof of loss on a general agent of a fire insurance company is service on the company.<sup>4</sup> And where a resident agent of a foreign company who issued and countersigned the policy was the only officer or agent of the company in the state, a tender of proofs of loss to such agent, coupled with his unexplained refusal to accept such proofs, constitutes a sufficient notice to the company, and this is so although the policy provides that the agent procuring the insurance is the agent of the assured, where the validity of the policy depends upon the countersignature of the agent.<sup>5</sup> If the local agent writes that the assured has requested him to notify the company, and it does not object, there is notice to it.<sup>6</sup> So it is sufficient if the company's agent, having knowledge of the loss, gives the notice, unless otherwise provided in the policy.<sup>7</sup> And there is evidence of a waiver where it appears that the beneficiary left word with the local agent's clerk at the agent's office, and that the latter notified the company that it had the case investigated.<sup>8</sup> If the local agent is requested to notify the company of the loss, and he says he has done so, and the notice is received by the company in due course of mail, it is sufficient, although such notice did not purport to be given on behalf of the insured.<sup>9</sup> And the same decision was given where the agent notified the company by letter, although the latter did not show that it was written at the request of the as-

<sup>3</sup> *Watertown F. Ins. Co. v. Grover & Baker Sewing Machine Co.*, 41 Mich. 131; 32 Am. Rep. 146; *Fisher v. Crescent Ins. Co.*, 33 Fed. Rep. 544.

<sup>4</sup> *North America Ins. Co. v. McLimans*, 28 Neb. 633; 44 N. W. Rep. 991.

<sup>5</sup> *North British & Mercantile Ins. Co. v. Crutchfield*, 108 Ind. 518; 9 N. E. Rep. 458.

<sup>6</sup> *Works v. Farmers' Ins. Co.*, 57 Me. 281.

<sup>7</sup> *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 280.

<sup>8</sup> *Insurance Co. v. Norment*, 91 Tenn. 1: 18 S. W. Rep. 395.

<sup>9</sup> *Loeb v. American Cent. Ins. Co.*, 99 Mo. 50; 12 S. W. Rep. 374. See, also, *Caston v. Monmouth Mut. F. Ins. Co.*, 54 Me. 170.

quired that notice of loss should be given within a certain time at a certain place, and the assured, the day following the fire, gave notice at another place to the company's agents, who said it was all right, and that they would give notice to the company, and that the adjuster would pay, and subsequently stated that the adjuster would come around and pay the loss, but thereafter refused to pay anything on another ground, it was held that there was no waiver.<sup>29</sup>

**§ 577. Misstatements by Agent in Proofs of Loss—Estoppel.**—The company is estopped to take advantage of its agent's misstatements made in the proofs of loss, and it is not error in such case for the court to refuse an instruction that the company was never furnished by the insured with the claim for indemnity contemplated under the policy.<sup>30</sup>

**§ 578. Where Agent Aids in Preparing Proofs of Loss—Waiver.**—Where the preliminary proofs are prepared under the advice, aid, or instructions of the company's authorized agent, such acts will operate as a waiver of defects therein, for if a party complies with the agent's instructions more cannot be required.<sup>31</sup> And where the assured acts in good faith, and the agent, with his assistance, prepares the proofs, they do not conclude the assured.<sup>32</sup> So where the local agent aids the assured in preparing such proofs, and the company retains them without objection for four months, and until suit is brought upon the policy, the company cannot object.<sup>33</sup> And if proofs are made by the company's adjusting agent within the proper time, and all material facts are furnished, they are sufficient.<sup>34</sup> So where the local agent receives notice of the fire

<sup>29</sup> *Engelbreton v. Hekla F. Ins. Co.*, 58 Wis. 301.

<sup>30</sup> *Young v. Travelers' Ins. Co.*, 80 Me. 250; 6 New Eng. Rep. 432. The request was that the court instruct the jury "that the plaintiff has never furnished to the defendant company a claim for indemnity such as is contemplated by the policy."

<sup>31</sup> *Sims v. State Ins. Co.*, 47 Mo. 54; *Security Ins. Co. v. Foy*, 22 Mich. 467; *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505.

<sup>32</sup> *Crittendon v. Springfield F. & M. Ins. Co.*, 85 Iowa, 652; 52 N. W. Rep. 548.

<sup>33</sup> *Palmer v. St. Paul F. & M. Ins. Co.*, 44 Wis. 201.

<sup>34</sup> *Jennison v. State Ins. Co.*, 85 Iowa, 229; 52 N. W. Rep. 185.

and writes the proofs, it is evidence that they were received by the principal, and that all objections were waived by a failure to make them.<sup>35</sup> But where the proofs of death are filled out under the agent's instructions, and he promises to lay the matter before the board upon the president's return, and states that it will probably be paid, no waiver arises from these acts.<sup>36</sup>

**§ 579. Agent—Waiver of Proofs of Loss—Condition Conflicting With Settled Rule of Law.**—It is held that a condition in the policy which conflicts directly with a settled rule of law will not be allowed to bind the assured, although he accepts the policy, unless it appears that his attention was specially called thereto.

**§ 580. Where Formal Proofs are Waived—Agent.**—Conditions in a fire policy as to proofs of loss are for the insurer's benefit, and can be waived by the company or its authorized agent,<sup>37</sup> for it is a general rule that stipulations which relate to procedure as in case of proofs of loss are to be reasonably, and not rigidly construed.<sup>38</sup> Such waiver or an estoppel against the company may arise from the acts, representations, or omissions of it or such agent upon which the assured may fairly rely, and by which he is reasonably induced to believe that a strict compliance with this condition has been excused or dispensed with in this case, and in consequence of which, acting in good faith, he fails or neglects to strictly comply with

<sup>35</sup> *Warner v. Peoria M. & F. Ins. Co.*, 14 Wis. 318. See, also *Atlantic Ins. Co. v. Wright*, 24 Ill. 462; *Frost v. Saratoga Ins. Co.*, 5 Denio (N. Y.), 154.

<sup>36</sup> *Ronald v. Mutual Res. F. L. Assn.*, 132 N. Y. 378; 44 N. Y. St. Rep. 409; 30 N. E. Rep. 739; 23 Abb. N. C. (N. Y.) 271.

<sup>37</sup> *Pitney v. Glenn Falls Ins. Co.*, 61 Barb. (N. Y.) 335. This rule was applied to a stipulation that no waiver of any condition concerning preliminary proofs of loss could arise from any act or omission of the company, its officers, or agents, except the same should be in writing, signed by certain officers of the company.

<sup>38</sup> *Bennett v. Maryland Ins. Co.*, 14 Blatchf. (C. C.) 422; *Peninsular etc. Mfg. Co. v. Franklin Ins. Co.*, 35 W. Va. 606; 14 S. E. Rep. 437; *Newman v. Springfield F. & M. Ins. Co.*, 17 Minn. 123; *Travelers' etc. Ins. Co. v. Harvey*, 82 Va. 949.

<sup>39</sup> *Paltrovitch v. Phoenix Ins. Co.*, 143 N. Y. 73; 60 N. Y. St. Rep. 462.

such requirement as to proofs of loss.<sup>40</sup> The acts of an agent, within the scope of his authority, in negotiating a settlement and inducing a belief, on the part of assured, that a settlement may be had without suit, and that the time limitation will not be set up in defense, will estop the company from urging such limitation.<sup>41</sup> And there is distinct evidence of a waiver requiring proofs to be made within a certain time where, upon receiving notice of the loss from a person who had an interest therein, the general agent and adjuster, ten days after the time limit had expired, went with a director to the place to settle the loss. The agent came again for the same purpose, but the insured was not present, and the agent, on being so informed and told that proofs of loss had not been furnished, said it would make no difference, and that the assured could make them on his return, which was done, and the same were retained several days by the company when they were returned.<sup>42</sup> So an agent of a foreign company, even though he may have no actual authority to waive proofs of loss, may bind the company thereby, it appearing that he was supplied with blank forms with the officers' lithographic signatures appended, and had power to solicit policies and collect premiums.<sup>43</sup> So proofs may be waived by parol, notwithstanding the policy provides that no condition shall be waived except by written indorsement.<sup>44</sup> And the question of waiver is properly submitted to the jury where the assured submits evidence that the company's general agent told him that proofs need not be furnished and the general agent denies the same.<sup>45</sup> And the sufficiency of preliminary proofs is admitted by the acts of the agent where, upon such proof being submitted, he ascertains the amount due and

\* *Peninsular etc. Mfg. Co. v. Franklin Ins. Co.*, 35 W. Va. 606; 14 S. E. Rep. 437.

\* *Fireman's Fund Ins. Co. v. Western Refrigerating Co.*, 55 Ill. App. 334.

\* *Owens v. Farmers' Joint Stock Ins. Co.*, 10 Abb. Pr., N. S. (N. Y.), 106, n.; 57 Barb. (N. Y.) 518.

\* *Syndicate Ins. Co. v. Catchings* (Ala. 1894), 16 S. Rep. 46.

\* *Lowry v. Lancashire Ins. Co.*, 82 Hun (N. Y.), 329.

\* *Bishop v. Agricultural Ins. Co.* (N. Y. 1892), 42 N. Y. St. Rep. 369; 30 N. Y. St. Rep. 600; 9 N. Y. Supp. 350; 29 N. E. Rep. 844.

brings it into court.<sup>46</sup> So where the secretary of the company, upon inquiry as to whether further proofs are required, tells the assured he may make other proofs if he pleases, and fails to point out the defects, and rests the defense on other grounds, this constitutes a waiver.<sup>47</sup> In another case the assured, before the time expired within which, under the terms of the policy, proofs must be made, inquired of the agent who effected the insurance as to what should be done, and the agent stated that he would write to the general agent, who would come, and that they would straighten up matters with him. They called upon the assured about a month after the loss. An affidavit containing an account of the loss was prepared and verified, and the agent promised to arrange the matter, and took away the affidavit. They called again the same day and talked over the loss. Thereafter, the assured sent proofs to the secretary, which were rejected because not sent in ten days as required by the terms of the policy. It was held that this was evidence for the jury of a waiver.<sup>48</sup> Where the company's officer goes upon the ground and agrees as to the valuation, this waives formal proof.<sup>49</sup> Again, if the company, knowing that a certain person assumes to act as its agent, has represented and undertaken that certain statements will be accepted as proofs of loss, and that assured has relied thereon and does not notify him to the contrary, but permits and encourages such belief, it is estopped to assert that such statements are not proofs of loss.<sup>50</sup>

§ 581. **Delivery of Proofs of Loss to Agent.**—There is a sufficient delivery of proofs when made to an authorized agent of the company or to one having apparent authority to act in the matter,<sup>51</sup> and in the absence of any provision to the contrary, the delivery of proofs of loss to the local agent will

<sup>46</sup> *Johnston v. Columbian Ins. Co.*, 7 Johns. (N. Y.) 315.

<sup>47</sup> *Peoria F. & M. Ins. Co. v. Whitehall*, 25 Ill. 466.

<sup>48</sup> *Underwood v. Farmers' Joint Stock Co.*, 48 How Pr. (N. Y.) 367; 57 N. Y. 500.

<sup>49</sup> *Coventry Mut. etc. Assn v. Evans*, 102 Pa. St. 231.

<sup>50</sup> *Enos v. St. Paul F. & M. Ins. Co.*, 4 S. Dak. 639.

<sup>51</sup> *North British etc. Ins. Co. v. Crutchfield*, 108 Ind. 518; *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. (N. Y.) 275.

be a sufficient delivery to the company.<sup>52</sup> So proofs may be made to a resident agent of a foreign company,<sup>53</sup> or to the company's officers,<sup>54</sup> or to a general agent of a foreign company authorized to transact business in the state,<sup>55</sup> or to the general agent through whom the policy was issued,<sup>56</sup> or to an adjuster authorized to settle the loss.<sup>57</sup> If, however, the policy provides that notice be given to a particular officer, as to the secretary, president, or specified agent, it must be done.<sup>58</sup>

**§ 582. Proofs of Loss—Place of Delivery—Waiver by Agent.**—There is a waiver of compliance with a condition requiring delivery of proofs to the secretary at the home office where the agent upon whom they were served at another place refused to receive the proofs solely on the ground that the policy was canceled.<sup>59</sup> So if the local agent is notified and furnished with the particulars of the accident, and thereafter another agent at another place writes the assured that the company had decided to pay him a certain sum, but that he had not established his claim by the proofs forwarded, there is a waiver of strict compliance with a condition requiring immediate notice in writing to the home office;<sup>60</sup> and it is sufficient if the delivery is made at the place of loss to the agent of the company and at his request.<sup>61</sup> So a condition in the policy that it

<sup>52</sup> *Insurance Co. v. Hope*, 58 Ill. 75; 11 Am. Rep. 48. See, also, *Commercial Union Assur. Co. v. State*, 113 Ind. 331; 15 N. E. Rep. 518; 13 West Rep. 47.

<sup>53</sup> *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620; 7 S. Rep. 596.

<sup>54</sup> *Thierolf v. Universal F. Ins. Co.*, 110 Pa. St. 37; *Edgerly v. Farmers' Ins. Co.*, 48 Ind. 644.

<sup>55</sup> *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620; 7 S. Rep. 596.

<sup>56</sup> *Pennington v. Pacific Mut. L. Ins. Co.*, 85 Iowa, 468; 52 N. W. Rep. 482.

<sup>57</sup> *Merchants' Ins. Co. v. Vining*, 67 Ga. 661.

<sup>58</sup> *Rokes v. Amazon Ins. Co.*, 51 Md. 512. See, also, *Inland Ins. etc. Co. v. Stauffer*, 33 Pa. St. 397; *German Ins. Co. v. Ward*, 90 Ill. 550; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Excelsior Mut. Aid Assn. v. Riddle*, 91 Ind. 84; *Sparrow v. Universal F. Ins. Co.*, 17 Phila. (Pa.) 329.

<sup>59</sup> *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283.

<sup>60</sup> *Unthank v. Travelers' Ins. Co.*, 4 Bliss. (C. C.) 357, citing several cases.

<sup>61</sup> *Badger v. Phoenix Ins. Co.*, 49 Wis. 396.

is payable at the company's office at a designated city, or at the general agency issuing it, is not a requirement that proofs be made at the company's office.<sup>62</sup> A delivery, however, of the required proofs to any officer at the company's office satisfies a requirement of delivery to the company.<sup>63</sup>

§ 583. **What Agent may Waive Proofs of Loss.**—An agent duly authorized may bind the company by an express waiver of proofs.<sup>64</sup> So a general agent appointed under a statute of Massachusetts<sup>65</sup> may waive proofs of loss where the company is a foreign stock company, and letters to such agent, not made known to the assured, are inadmissible to show a limitation of the agent's authority.<sup>66</sup> And the company's general agent may waive notice of death.<sup>67</sup> So a general agent may waive proofs by going to adjust the loss, and saying it makes no difference when they are prepared, and can be prepared by the plaintiff, he being then absent, on his return.<sup>68</sup> And an agent intrusted with policies signed in blank, and authorized to fill out and deliver them, may waive proofs of loss.<sup>69</sup> So a general agent authorized to transact business in the state may waive such proofs;<sup>70</sup> and where informal oral proofs are received by the officers, who recognize the company's liability, there is evidence of waiver of the time limit for furnishing such proofs.<sup>71</sup> So a local agent who effects the insurance may waive proofs,<sup>72</sup>

<sup>62</sup> *Pennington v. Pacific Mut. L. Ins. Co.*, 85 Iowa, 468; 52 N. W. Rep. 482.

<sup>63</sup> *Edgerly v. Farmers' Ins. Co.*, 48 Iowa, 644.

<sup>64</sup> *Perry v. Mechanics' Mut. Ins. Co.*, 11 Fed. Rep. 478.

<sup>65</sup> Massachusetts Gen. Stat., c. 58, secs. 66-78.

<sup>66</sup> *Eastern Railroad v. Relief etc. Ins. Co.*, 105 Mass. 570.

<sup>67</sup> *Prentice v. Knickerbocker L. Ins. Co.*, 43 N. Y. Sup. Ct. 352; 77 N. Y. 483; 11 Jones & S. (N. Y.) 352.

<sup>68</sup> *Owen v. Farmers' etc. Ins. Co.*, 57 Barb. (N. Y.) 518.

<sup>69</sup> *Franklin F. Ins. Co. v. Coates*, 14 Md. 285; *Imperial F. Ins. Co. v. Murray*, 73 Pa. St. 13; *Hibernia Ins. Co. v. O'Connor*, 29 Mich. 241; *Ide v. Phoenix Ins. Co.*, 2 Bliss. (C. C.) 333; *Norwich etc. Trans. Co. v. Western Mass. Ins. Co.*, 34 Conn. 561; *McBride v. Republic F. Ins. Co.*, 30 Wis. 562.

<sup>70</sup> *Phoenix Ins. Co. v. Bowdre*, 67 Miss. 620; 7 S. Rep. 596.

<sup>71</sup> *Thierolf v. Universal F. Ins. Co.*, 110 Pa. St. 37.

<sup>72</sup> *Ide v. Phoenix Ins. Co.*, 2 Bliss. (C. C.) 333. But see next section and sec. 476, herein.



although it is held in Minnesota that a local agent has no authority to bind the company by his statements as to the necessity of furnishing proofs of loss, as the proceedings to establish and enforce such claim are outside the implied authority of a local agent;<sup>73</sup> but an agent whose duty it is to keep a register of deaths, give notice thereof to the company, and furnish blanks for such proofs, may by his acts waive furnishing proofs in time, even when such acts are done after the prescribed time, nor in such case is a new consideration necessary.<sup>74</sup>

**§ 584. Waiver by Acts of Adjuster—Proofs of Loss.—**

An adjuster of the company may waive proofs of loss,<sup>75</sup> as where he is sent to effect a settlement, and after examination into the matter, states that the company neither admits nor denies liability and refuses to further consider the facts.<sup>76</sup> So the refusal by such agent to pay, based upon other grounds than defects in the proofs, also constitutes a waiver.<sup>77</sup> And where the adjuster, the day after the fire and at the place where it occurred, tells the insured he need not send notice or proofs of loss, he is excused.<sup>78</sup> If an adjuster is empowered to adjust and settle a loss and to receive proofs thereof, and goes to the assured's house, and finding that he is away, makes inquiries of his wife as to the cause of the fire and the ownership of the land, and leaves a request for the assured to call upon him next morning and bring his policy, and promises to pay the loss, this constitutes a waiver of the requirements that proofs be made in a specified time where the assured relies upon the statements of such agent and acts accordingly.<sup>79</sup> In another case the ad-

<sup>73</sup> So held in *Shapire v. St. Paul F. & M. Ins. Co.* (Minn. 1895), 63 N. W. Rep. 614. See sec. 587, herein.

<sup>74</sup> *Meyer v. Knickerbocker L. Ins. Co.*, 73 N. Y. 516.

<sup>75</sup> *Barre v. Council Bluffs Ins. Co.*, 76 Iowa, 609; 41 N. W. Rep. 373; *Slater v. Capitol City Ins. Co.*, 89 Iowa, 628; 57 N. W. Rep. 422; *Kahn v. Traders' Ins. Co.* (Wyo. 1893), 34 Pac. Rep. 1059. See *Searles v. Dwelling-House Ins. Co.*, 152 Mass. 263.

<sup>76</sup> *Deitz v. Prov. etc. Ins. Co.*, 33 W. Va. 526; 11 S. E. Rep. 50.

<sup>77</sup> *Aetna Ins. Co. v. Shryer*, 85 Ind. 362.

<sup>78</sup> *Phoenix Ins. Co. v. Pickel*, 3 Ind. App. 332; 29 N. E. Rep. 432.

<sup>79</sup> *Harris v. Phoenix Ins. Co.*, 85 Iowa, 238; 52 N. W. Rep. 128; distinguishing *Barre v. Insurance Co.*, 76 Iowa, 609; 41 N. W. Rep. 373. See *East F. Ins. Co. v. Brown*, 82 Tex. 631; *Mitchell v. Oriental Ins.*

juster and general agent told the assured that he need not furnish proofs of loss, and that the adjuster would soon be there and settle, and it was held that there was a waiver of proofs.<sup>80</sup> And where the proofs of loss are prepared under the adjuster's supervision, and after the adjustment such agent tells the assured that the company will not pay the loss, there is a waiver.<sup>81</sup> So where such agent adjusts and compromises the loss and agrees to pay in a few days, the company is estopped.<sup>82</sup> And formal proofs are waived where such agent spends several days with the assured's son in making a list of the property destroyed, and both employ a builder to make estimates as to the value of certain buildings, and refer such value to the determination of arbitrators.<sup>83</sup> And an adjusting agent may waive proofs by telling the assured that nothing further is required.<sup>84</sup> There is also a waiver where the adjuster tells the assured's attorney that the company would not pay, because of suspicious circumstances attending the fire.<sup>85</sup> So an adjuster sent to adjust the loss may waive requirements as to proofs, though not a general adjuster.<sup>86</sup> Proofs of loss were also held to be waived where the adjuster called upon the insured, who presented him with a schedule of the property destroyed and damaged by the fire, and the adjuster told him that he did not care for the proofs, and that they were not necessary.<sup>87</sup> If an agent is specially authorized to settle a loss, he may extend the time within which statement of loss may be made.<sup>88</sup> And there is also evidence of a waiver of strict proofs of loss where the adjuster inspects the premises, offers to compromise, and thereafter the

Co., 40 Ill. App. 111; *Home Ins. Co. v. Sorsby*, 60 Miss. 302; *Ætna Ins. Co. v. Schryer*, 85 Ind. 362. See Iowa Stat., McLains' Annot. Code, sec. 1734, as to written notice of loss.

<sup>80</sup> *Bishop v. Agricultural Ins. Co.*, 30 N. Y. St. Rep. 600; 9 N. Y. Supp. 350.

<sup>81</sup> *East Texas F. Ins. Co. v. Brown*, 82 Tex. 631; 18 S. W. Rep. 713.

<sup>82</sup> *Wagner v. Dwelling-House Ins. Co.*, 143 Pa. St. 338.

<sup>83</sup> *Gristock v. Royal Ins. Co.*, 87 Mich. 428; 49 N. W. Rep. 634.

<sup>84</sup> *Indiana Ins. Co. v. Capehart*, 108 Ind. 270.

<sup>85</sup> *McPike v. Western Assur. Co.*, 61 Miss. 37.

<sup>86</sup> *Liverpool etc. Ins. Co. v. Tillis* (Ala. 1895), 17 S. Rep. 672. See *Mix v. Royal Ins. Co. of Liverpool*, 169 Pa. St. 639; 32 Atl. Rep. 460.

<sup>87</sup> *Young v. Ohio Farmers' Ins. Co.*, 92 Mich. 68; 52 N. W. Rep. 454.

<sup>88</sup> *Lycoming Co. Mut. Ins. Co. v. Schollenberger*, 44 Pa. St. 259.

company furnishes blank proofs, which are filled out in the presence of the company's officers.<sup>89</sup> So, for the purpose of showing a waiver of defects in proofs, evidence is admissible of interviews between the assured's attorney and the company's adjusting agent, wherein he endeavored to see the proofs which were claimed to be defective, and a letter written after such interview is also admissible.<sup>90</sup>

**§ 585. When no Waiver by Adjuster of Proofs of Loss.** It is held that no waiver of the required proofs of loss arises from the fact that the adjuster went to the place of fire, made an examination of the assured, and offered to settle the loss, said offer being rejected.<sup>91</sup> And that where the company continuously insists upon strict proofs of loss and an appraisalment, no waiver exists because the adjuster goes upon the premises after the loss and commences an examination into the matter.<sup>92</sup> Nor can a waiver be based upon the fact that the general agent and adjuster offers to advise the company to pay if the assured will settle on a certain basis.<sup>93</sup> Nor is there any waiver of the required proofs where, at his request, a statement of the property lost and its value is made to the adjuster.<sup>94</sup> Where a policy provided that there could be no waiver of any of the conditions therein, except by the secretary, and by him only in writing indorsed on the policy, it was held that an adjuster of the company could not orally waive proof of loss.<sup>95</sup>

**§ 586. Acts of Agent in Adjusting Loss—How Far Binding on Company.**—The insurer may show that an adjustment made by its agent is erroneous.<sup>96</sup> If the adjuster, with

<sup>89</sup> *Argall v. Old North State Ins. Co.*, 84 N. C. 355.

<sup>90</sup> *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329; 18 N. E. Rep. 804.

<sup>91</sup> *Liverpool etc. Ins. Co. v. Lonsby*, 60 Miss. 302.

<sup>92</sup> *Scottish Union Nat. Ins. Co. v. Clancey*, 83 Tex. 113; 18 S. W. Rep. 439.

<sup>93</sup> *Knudson v. Hekla F. Ins. Co.*, 75 Wis. 198; 43 N. W. Rep. 954; 46 N. W. Rep. 483; 49 N. W. Rep. 751.

<sup>94</sup> *Knudson v. Hekla F. Ins. Co.*, 75 Wis. 198; 43 N. W. Rep. 954; 46 N. W. Rep. 483; 49 N. W. Rep. 751.

<sup>95</sup> *Kirkman v. Farmers' Ins. Co.*, 90 Iowa, 457; 57 N. W. Rep. 952.

<sup>96</sup> *Bordes v. Hallett*, 1 Calnes (N. Y.), 444.

full knowledge of the facts constituting a forfeiture, recognizes the validity of the policy, and negotiates with the assured for a settlement, the forfeiture is waived.<sup>97</sup> So a breach of all conditions of the policy is waived by the acts and statements of the adjuster in adjusting and compromising a loss and agreeing to pay the same in a few days;<sup>98</sup> although it is held that no presumption arises that the adjusting agent, as such, has authority to waive forfeitures.<sup>99</sup> It is also held that no waiver of a forfeiture can be inferred by the mere reference of the matter after a fire to the adjuster for investigation and appraisal, where the policy provides that no officer of the company can waive the provisions of the policy except by proper indorsement.<sup>100</sup> In another case the defendant's agent joined with other companies in adjusting the loss, and promised to pay his company's proportion. The assured settled with the other insurers on the basis of the adjustment. Subsequently the agent paid back part of the unearned premium, retaining a part thereof. It was held that the company was estopped by the acts of the agent from denying its liability.<sup>101</sup> So where the agent examined the premises after the fire, and with full knowledge of all the facts, voluntarily paid, or caused the company to pay, the amount of loss, the principal cannot recover back the money so paid on the ground that the policy did not cover the loss.<sup>102</sup> But a forfeiture for additional insurance is waived by the adjuster, with knowledge thereof, putting the assured to the expense of making and correcting proofs of loss from time to time, and representing that the company will not claim the forfeiture.<sup>103</sup>

<sup>97</sup> *Oshkosh Gaslight Co. v. Germania F. Ins. Co.*, 71 Wis. 454; 37 N. W. Rep. 819.

<sup>98</sup> *Wagner v. Dwelling-House Ins. Co.*, 143 Pa. St. 338.

<sup>99</sup> *Hollis v. State Ins. Co.*, 65 Iowa, 454.

<sup>100</sup> *Hill v. London Assur. Corp.*, 16 Daly (N. Y.), 120; s. c. 30 N. Y. St. Rep. 539; 9 N. Y. Supp. 500; 34 N. Y. St. Rep. 65.

<sup>101</sup> *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422.

<sup>102</sup> *Nebraska & I. Ins. Co. v. Segard*, 29 Neb. 354; 45 N. W. Rep. 681.

<sup>103</sup> *Pennsylvania F. Ins. Co. v. Kittle*, 39 Mich. 51. See further as to powers of adjuster, *Fishbeck v. Phoenix Ins. Co.*, 54 Cal. 422; *Little v. Phoenix Ins. Co.*, 123 Mass. 318; *Hollis v. State Ins. Co.*, 61 Iowa, 454; *New Orleans Ins. Co. v. Matthews*, 65 Miss. 301.

**§ 587. What Agent May not Waive Proofs of Loss.—**

There are numerous cases which hold that a local agent, having authority only to receive proposals for insurance, fix rates of premium, countersign and issue policies, has no power, after issuing the policy, to waive compliance with conditions of a policy, concerning proofs of loss;<sup>104</sup> nor does the power of such agent extend to adjusting losses, and the fact that he assumes to act in the particular case does not establish his authority so to do.<sup>105</sup> So it is held that the president cannot waive preliminary proofs where the company's charter provides that all business shall be transacted by the president and one-third of the directors.<sup>106</sup> There can be no waiver of proofs of loss by a special agent of the company where it appears that the insured had notice that such agent had no power to waive any of the conditions of the policy.<sup>107</sup>

**§ 588. Proofs of Loss—What is not a Waiver—Agent.**

No sufficient evidence of waiver arises from the fact that the company's traveling agent, upon being told of the loss, replied that it would be all right with the company,<sup>108</sup> and where the by-laws of a mutual company require proofs of loss to be made within a specified time, no waiver arises from a subsequent direction of the board of directors that the assured should send them a statement of the loss, and they would take the subject into consideration, or by a subsequent vote of directors that

<sup>104</sup> *Smith v. Niagara Falls Ins. Co.*, 60 Vt. 682; 1 L. R. Annot. 216; 15 Atl. Rep. 353. See sec. 583, herein; *Hanlson v. Hartford F. Ins. Co.*, 59 Fed. Rep. 732; 23 Ins. L. J. 161; *Sohnes v. Insurance Co.*, 121 Mass. 439; *Knudson v. Hekla F. Ins. Co.*, 75 Wis. 198; 43 N. W. Rep. 954; 46 N. W. Rep. 483; *Bowlin v. Hekla F. Ins. Co.*, 36 Minn. 433; *Van Allen v. Farmers' etc. Ins. Co.*, 64 N. Y. 469; *Reynolds v. Continental Ins. Co.*, 36 Mich. 131; *Forest City Ins. Co. v. School Directors*, 4 Ill. App. 145; *Bush v. Westchester F. Ins. Co.*, 63 N. Y. 531; *Bonneville v. Western Assur. Co.*, 68 Wis. 298; 32 N. W. Rep. 34. That local agent with authority to sign and issue policies may not waive requirements as to proofs of loss, see *Burlington Ins. Co. v. Kennerly*, 60 Ark. 532; 31 S. W. Rep. 155.

<sup>105</sup> *Bush v. Westchester F. Ins. Co.*, 63 N. Y. 531, per *Rapallo, J.*, reversing case below.

<sup>106</sup> *Dawes v. North River Ins. Co.*, 7 Cow. (N. Y.) 462.

<sup>107</sup> *Dwelling-House Ins. Co. v. Jones*, 47 Ill. App. 261.

<sup>108</sup> *Boyle v. North Carolina Ins. Co.*, 7 Jones L. (N. C.) 373.

the assured be required to make a statement under oath in regard to the loss;<sup>109</sup> nor is there any waiver of the required proofs from the fact that the agent stated that he was not prepared to pay the loss;<sup>110</sup> nor does a waiver of service of proofs of loss arise from the acts of the secretary in acknowledging the receipt of notice of loss, and stating therein, in response to a request for proof blanks, that there were none on hand, and that the adjuster would not probably reach the case in two weeks;<sup>111</sup> and where the company sends an agent to inspect the premises and investigate the loss, this is not sufficient evidence of waiver where it appears that the agent requested the assured to send proofs to the company.<sup>112</sup> So it is held that if an agent's power is restricted in the policy, he cannot orally waive proofs of loss.<sup>113</sup>

**§ 589. Retention of Proofs of Loss by Agent—Failure to Object.**—If the proofs of loss are insufficient, and the assured, acting in good faith, intends to comply with the requirements of the policy when he prepares them, it is the duty of the authorized agent who receives them to object at once. Good faith requires this, so that the assured may ascertain and obviate such defects as exist. And the silence of the company or its authorized agents in such case may so mislead the assured to his disadvantage as to estop the company. So the refusal of the agent to receive the preliminary proofs, on the ground that the company is not liable for the loss, prevents the latter from raising objections to the sufficiency of the proofs.<sup>114</sup> So where the agent receives and retains notice and affidavits of loss without objecting thereto, the company is thereby estopped to aver that they are defective or not properly

<sup>109</sup> *Smith v. Haverhill Mut. F. Ins. Co.*, 1 Allen (Mass.), 297; 79 Am. Dec. 733.

<sup>110</sup> *McCann v. Aetna Ins. Co.*, 3 Neb. 198.

<sup>111</sup> *Birmingham v. Farmers' etc. Ins. Co.*, 67 Barb. (N. Y.) 595.

<sup>112</sup> *Busch v. Insurance Co.*, 6 Phila. (Pa.) 252.

<sup>113</sup> *Gould v. Dwelling-House Ins. Co.*, 90 Mich. 302. We have considered this question fully, however, under sections in a prior chapter on agency, as to the effect of limitations in a policy on agent's authority.

<sup>114</sup> *Lycoming F. Ins. Co. v. Dunmore*, 75 Ill. 14. See *Whitmore v. Dwelling-House Ins. Co.*, 148 Pa. St. 405; 23 Atl. Rep. 1131.

made or presented.<sup>115</sup> And this rule applies where additional proofs made to remedy defects in the first proofs are received by the agent and he fails to object.<sup>116</sup> So where the adjuster visits the premises after the fire, and makes and submits an estimate of the cost of rebuilding, and fails to object to the proofs of loss either as to their sufficiency or nonservice in time, these defects are waived.<sup>117</sup> And there is a waiver of a strict compliance with the requirements as to proofs where the agent who receives them retains them, and fails to specify the details wherein they are deficient, although he tells the assured in a general way that they are insufficient.<sup>118</sup> So there is no error in instructing the jury that if proofs are served on the agent, who keeps and never returns them, and fails to object to delay in furnishing them, such delay is waived, although it is bad practice to instruct the jury to infer a fact from other facts; and it was also held in this case that a provision that nothing less than a distinct agreement indorsed on the policy should constitute a waiver of conditions therein, referred to other provisions than those relating to proofs of loss.<sup>119</sup> But it is held that there is no waiver where the agent receives the proofs of loss without objecting to the failure to furnish the magistrate's certificate of loss, as required by the policy.<sup>120</sup>

**§ 590. Proofs of Loss—Examination by Agent—Waiver.** If the company's authorized agent examines the premises and investigates the loss, and refuses to pay, all questions are waived as to the sufficiency of proofs of loss.<sup>121</sup> So where the company sends a man to examine into the facts connected with the loss, and he takes the assured's affidavit and prosecutes inquiries, the company thereby waives its right to insist upon

<sup>115</sup> *Hartford etc. Ins. Co. v. Walsh*, 54 Ill. 164.

<sup>116</sup> *Home Ins. Co. v. Cohen*, 20 Gratt. (Va.) 312.

<sup>117</sup> *Capitol City Ins. Co. v. Caldwell*, 95 Ala. 77; 10 S. Rep. 355.

<sup>118</sup> *Madsden v. Phoenix Ins. Co.*, 1 S. C. 24.

<sup>119</sup> *Wheaton v. North British & Mercantile Ins. Co.*, 76 Cal. 415; 18 Pac. Rep. 758.

<sup>120</sup> *Daniels v. Equitable F. Ins. Co.*, 50 Conn. 551.

<sup>121</sup> *Fisher v. Crescent City Ins. Co.*, 33 Fed. Rep. 544; *McBride v. Republic F. Ins. Co.*, 30 Wis. 562.

proofs of loss.<sup>122</sup> But if the company continuously insists upon proofs of loss, no waiver arises from the fact that its adjuster and agent went to the scene of the fire and commenced an examination into the matter of loss.<sup>123</sup>

**§ 591. Proofs of Loss—Waiver—Agent's Denial of Company's Liability—Other Grounds.**—The company will be estopped from making any formal objections to proofs of loss, or from defending on the ground of defects in form, where the agent, upon tender of the proofs, refuses them on the ground that the company is not liable for the loss.<sup>124</sup> And evidence is admissible of a letter written by an authorized officer of the company to the assured acknowledging receipt of the proofs and denying liability of the company for the loss, and that the proofs were held subject to his order.<sup>125</sup> So if the agent represents that the assured had been released by reason of an alienation of the property, and that proofs would be of no avail, and the assured, in consequence thereof, does not make proofs, the company is estopped.<sup>126</sup> And all objections are waived where the agent, when proofs are delivered to him, asserts that the policy has been canceled, and the company is not liable.<sup>127</sup> And the same rule obtains if the agent, on application therefor, refuses the necessary blanks for proofs, on the ground that the company does not recognize the claim.<sup>128</sup> The rule also applies where the agent, on being notified of the death, declares that the policy is forfeited for nonpayment of premium,<sup>129</sup> where he states that it is useless to make proofs, as the policy is

<sup>122</sup> *Balle v. St. Joseph F. & M. Ins. Co.*, 73 Mo. 371; *Cumberland Valley Mut. Prot. Co. v. Schell*, 29 Pa. St. 31.

<sup>123</sup> *Scottish Union etc. Ins. Co. v. Clancy*, 83 Tex. 113; 18 S. W. Rep. 439.

<sup>124</sup> *Lycoming F. Ins. Co. v. Dunmore*, 75 Ill. 14; *Manhattan Ins. Co. v. Stein*, 5 Bush (Ky.), 652; *Williamsburg City F. Ins. Co. v. Cary*, 83 Ill. 453.

<sup>125</sup> *Capitol Ins. Co. v. Pleasanton*, 50 Kan. 449; 29 Pac. Rep. 576.

<sup>126</sup> *Manhattan Ins. Co. v. Stein*, 5 Bush (Ky.), 652.

<sup>127</sup> *Commercial Union Asur. Co. v. State*, 113 Ind. 331; 15 N. E. Rep. 518; 13 West. Rep. 47; *La Société v. Morris*, 24 La. Ann. 347.

<sup>128</sup> *Dean v. Ætna L. Ins. Co.*, 2 Hun (N. Y.), 358; 4 N. Y. S. C. 497; 42 N. Y. 642.

<sup>129</sup> *Marston v. Massachusetts L. Ins. Co.*, 59 N. H. 92.



void,<sup>130</sup> or in case he declares that the company will not pay, because the sales were greater than the purchases, and denies all liability.<sup>131</sup> And in case the agent terminates negotiations for settlement by refusing to pay, by reason of a defect in title, this waives conditions as to notice and proofs of loss.<sup>132</sup> So where the adjusting agent refuses to pay on other grounds, there is a waiver.<sup>133</sup> And a letter from the secretary, in response to a notice of loss made after the time limited, promising to lay the matter before the executive committee, and a subsequent letter denying liability and refusing to pay on the ground of failure to pay assessments, is a waiver of proof.<sup>134</sup> So where the local agent makes out the proofs of loss wrongly, and sends them to the company, and it does not object thereto on that ground, but on others, there is a waiver.<sup>135</sup> And the refusal to pay on the ground that the property did not belong to the insured constitutes a waiver of preliminary proofs.<sup>136</sup> Again, where the general agent, after investigating the accident, stated to the assured that he had no case, and took from the attendant physician the blank notice and proof of death, this constitutes a waiver of notice and proof.<sup>137</sup> So if the president refuses payment of the loss on grounds other than the want of the required preliminary proofs, there is evidence of waiver.<sup>138</sup> But where proofs are delayed, there is no waiver by the acknowledgment by the agent of receipt thereof, although the agent specifies certain other conditions as having been broken by the assured.<sup>139</sup>

**§ 592. Proofs of Loss—Delay Caused by Agent.—**Where the conditions of the policy specify a time limit within which proofs of loss shall be furnished, a waiver of such provi-

<sup>130</sup> *Kantreuer v. Pennsylvania Mut. L. Ins. Co.*, 5 Mo. App. 581.

<sup>131</sup> *McBride v. Republic F. Ins. Co.*, 30 Wis. 562.

<sup>132</sup> *Ætna Ins. Co. v. Sparkes*, 62 Ga. 187.

<sup>133</sup> *Ætna Ins. Co. v. Shryer*, 85 Ind. 362.

<sup>134</sup> *Noyes v. Washington Ins. Co.*, 30 Vt. 659.

<sup>135</sup> *Whittle v. Farmville Ins. etc. Co.*, 3 Hughes (C. C.) 421.

<sup>136</sup> *Franklin F. Ins. Co. v. Coates*, 14 Md. 285.

<sup>137</sup> *Travelers' Ins. Co. v. Harvey*, 82 Va. 949; 5 S. E. Rep. 553.

<sup>138</sup> *Stetson v. Insurance Co.*, 4 Phila. 8.

<sup>139</sup> *Brown v. London Assur. Corp.*, 40 Hun (N. Y.), 101.

sion, or an estoppel against the company to insist on a compliance therewith, may arise from the acts or declarations of its agents, done or made with knowledge of the loss, in consequence of which the assured has delayed furnishing such proofs within the required time.<sup>140</sup> Thus, where a policy provides that no action shall be brought on it unless begun within twelve months from the loss, the condition is waived by such designed conduct on the part of the general agents of the company as encourages and authorizes the insured to believe that his claim will be adjusted and paid after the limited time has elapsed.<sup>141</sup> So the company is estopped where the delay in furnishing proofs is occasioned by the act of the company's secretary.<sup>142</sup> In a Massachusetts case the agent was authorized to fill out and deliver blank policies, duly signed. He was told by the secretary of the insured, a railroad company, that they were carefully examining into claims made for fires along the road, which were numerous. The agent replied that this was satisfactory, and that a schedule of the claims paid should be given the insurer when they had been settled, and they would be attended to. This was held a waiver of preliminary proofs, the secretary of the insured, about eight months after all the claims had been settled, and long after the time for making proofs had expired, having forwarded a sworn statement thereof to the company.<sup>143</sup> So there is a waiver where the assured is unable to make the proofs in time because the company or its agent has possession of the books, and it also appears that when the agent took possession thereof he agreed to waive any defense for failure to serve proofs in time.<sup>144</sup> And where the local agent, upon being notified of the loss, induced the assured to neglect making formal proofs of loss by representations that it would be useless, by reason of the bankruptcy of the company, it was held that the other creditors could not, in an action against the receiver, profit by such neglect of the assured.<sup>145</sup>

<sup>140</sup> *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. (Va.) 88; *Dohn v. Farmers' Joint Stock Ins. Co.*, 5 Lans. (N. Y.) 275.

<sup>141</sup> *Little v. Phoenix Ins. Co.*, 123 Mass. 380; 25 Am. Rep. 96.

<sup>142</sup> *State Ins. Co. v. Todd*, 83 Pa. St. 272.

<sup>143</sup> *Eastern R. R. Co. v. Relief F. Ins. Co.*, 105 Mass. 570.

<sup>144</sup> *Mack v. Lancashire Ins. Co.*, 4 Fed. Rep. 59, 62.

<sup>145</sup> *Pennell v. Chandler* (Ill.) 7 Chl. Leg. News, 227. In this case *Joyce*, Vol. I—47

But it is held that delay in furnishing the required proofs is not justified by the declarations of the company's agent that the claim was all right, and that the adjuster would be around and settle in a few days;<sup>146</sup> nor is there sufficient evidence of waiver from the fact that a person who represented himself as president, told a witness at the company's office that he did not believe the premises would hold the amount of stock claimed, and that he was so informed by an agent who had been sent to the place of the fire, and the witness denied the correctness of the information, and inquired what further proofs were required, and stated that he would supply them, to which the president replied by referring witness to the policy. There was no evidence on the trial as to the contents of the claimed proofs, nor were they produced, although demanded of the company.<sup>147</sup>

**§ 593. Custom of Other Agents—Proofs of Loss—Waiver.**—Evidence is inadmissible that it was the custom of other agents not to require proofs of loss where such evidence is offered to bind the particular company by such custom. If, however, it is attempted to show the extent of authority of the agent acting in the matter, evidence may be admissible of the custom and usages of the company charged with the liability, and upon which the assured relied, or was justified in relying.<sup>148</sup>

the assured inquired, after his loss had been sustained, for the offices of the company in Chicago, but they had recently ceased to do business there, although it had formerly been their home office. He notified the local agents of the town wherein the loss occurred, and being informed by them that the company was then wholly bankrupt, was led to believe that recovery was impossible and proof of loss useless: *Per Walker, J.*

<sup>146</sup> *Engbretson v. Hekla F. Ins. Co.*, 58 Wis. 301.

<sup>147</sup> *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1.

<sup>148</sup> *Phoenix Ins. Co. of Brooklyn v. Munger*, 49 Kan. 178; 30 Pac. Rep. 120, reversing decision of district court upon appeal. *Green, J.*, said: "In this case there was a written contract expressing what was to be done by the parties, and we do not think this agreement could be modified by the custom of other insurance companies or their agents in regard to dispensing with proofs of loss. We are clearly of the opinion that this evidence was incompetent and prejudicial to the rights of the defendant company."

§ 594. **Fraud of Agent in Inducing Settlement—Waiver—Proofs of Loss.**—The doctrine that fraud vitiates a contract applies to a compromise of a claim for loss under a policy when the same is induced by the fraud of the insured or its authorized agents. But if the assured repudiates such compromise as to the amount, he does not lose the benefit of a waiver arising therefrom of proofs of loss.<sup>149</sup>

§ 595. **Adjustment of Loss—Agent.**—It is declared in a New York case<sup>150</sup> that an agent merely authorized to receive proposals for insurance and countersign and deliver policies has no power to adjust losses; that some authority therefor, or a ratification of the agent's acts, or usage warranting the exercise of such authority, must be shown. It is held, however, in an English case<sup>151</sup> that an agent who has implied authority to subscribe a policy for the underwriter is empowered to adjust a loss and to use the necessary means therefor. This latter case, however, under the usual course of business of insurance companies in the United States, can hardly be said to govern. A broker has no authority as such to adjust and pay a loss for the underwriter, and in case he does so, he cannot recover back the sum paid.<sup>152</sup> Whether an agent to subscribe has authority to pay or adjust a loss must depend greatly upon the actual relations existing between the principal and his agent as well as upon the custom of doing business pursued by the agent

<sup>149</sup> *Platt v. Continental L. Ins. Co.*, 62 Vt. 166; 19 Atl. Rep. 637. Upon appeal the court said: "If the compromise was fraudulent, it did not bind the plaintiff, and the evidence offered tending to show it should have been received, and the plaintiff permitted to recover the actual loss under the policy. Any question of waiver of proof was immaterial. We think the offer to show the compromise fraudulent was distinct. We do not decide that a compromise made in good faith would bind the assured, but the court erred in not submitting the question as to fraud or not to the jury; for if fraudulent the plaintiff is not bound by it."

<sup>150</sup> *Bush v. Westchester F. Ins. Co.*, 63 N. Y. 531.

<sup>151</sup> *Richardson v. Anderson*, 1 Camp. 43, n.

<sup>152</sup> *Bell v. Auldjo*, 4 Doug. 48; *Wilson v. Creighton*, 3 Doug. 132; *Baker v. Langhorn*, 4 Camp. 396; *Moody v. Webster*, 3 Pick. (20 Mass.) 424. As to mode of settlement between the assured, the broker, and the underwriter in England, see 1 Arnould on Marine Insurance, Perkins' ed., p. 14.

and acquiesced in by the principal. Usage of the place or trade is also important; likewise what authority the agent is held out to possess. No general rule can be established without reference to these facts, since it could hardly be assumed that a mere limited authority to sign could be extended by implication, so as to warrant an adjustment and payment of a loss, unless some other fact or authorization exists which would justify the exercise of a more extended power.<sup>153</sup> An agent who is specially authorized to adjust a particular loss has no authority by virtue of such employment to adjust a different loss. An agent can only act within the scope of his actual or apparent authority.<sup>154</sup> Although an average bond is signed by the insurer's agent without authority therefor and by stipulation whatever sum is found due for general average must be paid by the insurers, the vessel's valuation must be taken as provided in the average bond.<sup>155</sup> Again, there is an adjustment if a person employed by an insurance company has gone to the premises, made calculations, and stated the amount to be paid.<sup>156</sup> Where a policy is void because the insured kept prohibited articles in the house, a promise on the part of the insurer's agent to pay a loss will not bind them, although the agent having authority to adjust and pay losses has knowledge that the prohibited articles were kept in the house at the time of the fire.<sup>157</sup> And if the assignee of the policy is not permitted to participate in an adjustment by the company's agent, such adjustment is not binding upon him.<sup>158</sup>

**§ 596. Particular Account—Loss—Waiver by Agent.**

The time for rendering the particular account required is extended by the acts of the adjusting agent in examining the premises and books of the assured;<sup>159</sup> and an agent may waive

<sup>153</sup> See 2 Phillips on Insurance, 3d ed., 541, secs. 1873, 1874; *Bush v. Westchester F. Ins. Co.*, 63 N. Y. 531.

<sup>154</sup> *Hartford F. Ins. Co. v. Smith*, 3 Col. 422.

<sup>155</sup> *Wheaton v. China Mut. Ins. Co.*, 39 Fed. Rep. 879.

<sup>156</sup> *Fame Ins. Co. v. Norris*, 18 Ill. App. 570.

<sup>157</sup> *Phoenix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; 81 Am. Dec. 521.

<sup>158</sup> *London F. Assn. v. Leon*, 63 Tex. 282.

<sup>159</sup> *Jones v. Mechanics' F. Ins. Co.*, 36 N. Y. 29. See *Ligon v. Insurance Co.*, 87 Tenn. 341.

particulars of the loss where he has authority to make contracts and is furnished with properly signed and attested blanks to countersign and deliver.<sup>160</sup> So where an examination is made by agreement with the insured, of his books, and the president of the company acknowledges receipt of a statement of the claim, but rejects it for general reasons, there is a waiver of delivery of a particular account.<sup>161</sup> And furnishing such account is waived where the general agent uses such language as is calculated to induce the assured to delay preparing the same, especially where the company afterward rejects the proofs of loss on other grounds than delay in furnishing them.<sup>162</sup> So the resident agent of the company to which it refers the assured, and who is instructed to obtain a statement of the loss, is thereby invested with authority to extend the time for making a particular account of loss.<sup>163</sup> But a waiver by an agent of notice of the loss does not include a waiver of the particular account or proofs required to be furnished.<sup>164</sup>

§ 597. **Marine Protest—Waiver—Agent.**—If the policy requires a protest to be made by the master and crew before the nearest convenient notary as soon as practicable after the disaster, such protest to set forth substantially the cause of disaster and the extent of the damage, such condition must be performed, nor is the right of the underwriter to a legal protest waived by a direction of the company's agent to one of the crew to make a protest before an officer, nor by such agent's remark made before the issuance of the policy that he would send the master word, which he did not do, nor by the fact that the master and crew had no knowledge that the vessel was insured.<sup>165</sup> But where the agent upon notification of the loss demands the master's protest, and having received the same denies liability, there is a waiver of preliminary proofs.<sup>166</sup>

<sup>160</sup> *Imperial F. Ins. Co. v. Murray*, 73 Pa. St. 13.

<sup>161</sup> *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. St. 350.

<sup>162</sup> *Dohn v. Farmers' etc. Ins. Co.*, 5 Lans. (N. Y.) 275.

<sup>163</sup> *Lycoming Co. Ins. Co. v. Schollenberger*, 44 Pa. St. 250.

<sup>164</sup> *Desilver v. State etc. Ins. Co.*, 38 Pa. St. 130.

<sup>165</sup> *Peoria etc. Ins. Co. v. Walker*, 22 Ind. 73.

<sup>166</sup> *Maryland Ins. Co. v. Bathurst*, 5 Gill & J. (Md.) 159.

§ 598. **Agent's Powers After Loss—Generally.**—If an agent has authority to fill up a blank policy with which he is intrusted, and which is duly signed and attested by the proper officers of the company, he may after a loss has occurred fill up the policy in conformity with a parol preliminary agreement. The assured in such case is entitled to the policy as his property, and may enforce his right to its possession by a proper action therefor; or he may sue for the loss in case of refusal of the company to deliver it up;<sup>167</sup> but if no binding contract is made at the time the loss occurs the agent has no authority to ratify an attempted contract and issue a certificate after loss;<sup>168</sup> nor has a general agent, although authorized to issue policies, any authority to issue a policy on property already destroyed, and while the application for the policy is on its way from the applicant to the agent;<sup>169</sup> nor does the authority of an insurance agent to countersign policies on his own property extend to such policies antedated before a loss, but signed thereafter.<sup>170</sup> And where an agent, being directed by company to cancel a policy, exchanges such a policy after a loss for one in another company of which he is also agent, no recovery can be had against the latter company, it appearing that it had refused the agent leave to issue a policy to the assured.<sup>171</sup> An agent who issues the policy may after the loss accept an order of the assured to pay the loss to another person, such agent having authority to assent to assignments and transfers, circulars issued by him stating that losses would be paid through him and in bankable funds.<sup>172</sup> But an agent for soliciting insurance cannot estop the company by admissions after loss.<sup>173</sup> And where the agent through whom the policy had been obtained, upon being consulted by an intending purchaser of the policy after a loss by fire, stated that the claim

<sup>167</sup> *Franklin F. Ins. Co. v. Colt*, 20 Wall. (U. S.) 560; 4 Ins. L. J. 367, note.

<sup>168</sup> *Blake v. Hamburg-Bremen F. Ins. Co.*, 67 Tex. 160; 2 S. W. Rep. 368.

<sup>169</sup> *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421.

<sup>170</sup> *Glens Falls Ins. Co. v. Hopkins*, 16 Ill. App. 220.

<sup>171</sup> *Wilson v. New Hampshire F. Ins. Co.*, 140 Mass. 210.

<sup>172</sup> *Miller v. Phoenix Ins. Co.*, 27 Iowa, 203.

<sup>173</sup> *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; 6 S. Rep. 143.

was all right and would be paid, it was held that a replication setting up such facts was good on demurrer, the defense being misrepresentations by the assured as to encumbrances, etc.<sup>174</sup>

**§ 599. Fraud of Agent—Settlement—Award—Assignment.**—If an agent authorized to act in relation to the loss or its adjustment, or the settlement thereof, misleads or induces the assured by false and fraudulent representations to settle for less than the amount, such settlement does not bind the assured. Thus, in the case of a life risk it appeared that the agent fraudulently represented to the executor of the assured, whose mental faculties were impaired, that the company would contest and defeat the policy; that it had sufficient evidence to prove it void; and the executor was thereby induced to settle for a grossly inadequate sum, and it was held that the assured might have the settlement set aside and recover the balance.<sup>175</sup> The same rule applies where the adjuster fraudulently represents the policy to be void for breach of conditions, and induces a settlement.<sup>176</sup> And where the beneficiary is so induced to compromise, he may retain the money received and sue for the damages consequent upon the deceit.<sup>177</sup> So in case an award is signed when incomplete, by reason of the false statements of one of the adjusters, the adjusters of other interested companies being present and acting in concert with him, the insurers cannot claim the benefit of the falsehood.<sup>178</sup> In another case, where the company's agent was authorized to obtain the surrender of a certain paid-up policy for the sum of three thousand dollars, and by fraudulent acts obtained the assignment for two thousand dollars and retained the balance, it was held that the company was liable for such balance.<sup>179</sup> But it is held that a settlement induced by such fraudulent

<sup>174</sup> *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551; 6 S. Rep. 143.

<sup>175</sup> *McLean v. Equitable L. Assur. Soc.*, 100 Ind. 127; 50 Am. Rep. 779.

<sup>176</sup> *Berry v. American Cent. Ins. Co.*, 132 N. Y. 49; 43 N. Y. St. Rep. 400; 30 N. E. Rep. 254; 8 N. Y. Supp. 762; 45 Alb. L. J. 402.

<sup>177</sup> *Michigan Mut. L. Ins. Co. v. Naugle*, 130 Ind. 79; 29 N. E. Rep. 393.

<sup>178</sup> *Herndon v. Imperial F. Ins. Co.*, 110 N. C. 279; 14 S. E. Rep. 742.

<sup>179</sup> *Atkins v. Equitable L. Assur. Soc.*, 132 Mass. 395.



representations of the agent does not authorize the assured to ignore the compromise while retaining its benefits and to sue on the policy,<sup>180</sup> and that the assured has no cause of action against the company for such representation.<sup>181</sup> It is also decided, where an offer of settlement is made by an adjusting agent, his statement that the assured would not be likely to recover more in an action for the loss is only an expression of opinion, and not an assertion upon which the assured could rely, and that the settlement having been made, no further recovery could be had upon the ground of misrepresentation.<sup>182</sup>

**§ 600. Agent's Authority—Arbitration—Appraisement.**

An agent who subscribes the policy as such, or who is authorized to settle losses, may after loss agree to submit a claim to arbitrators.<sup>183</sup> Where the company's adjuster represents that the appraiser named by him was disinterested, but, on the contrary, he was an employee of the company employed in estimating losses in its interest, the award will be set aside;<sup>184</sup> and if through the fault of the company's adjusters the award is limited to the damage to certain goods only, and not of the entire amount, the award is not conclusive.<sup>185</sup> So in case the adjuster of the company denies the company's liability after the insured refuses to sign a proper submission to an appraisal, there is no waiver under a policy requiring a submission to arbitrators.<sup>186</sup> And where the policy expressly provides for arbitration, and that the same shall not operate as a waiver of any of the conditions in the policy, no waiver of forfeiture arises in such case by reason of the fact that the company's agent goes to the place of the fire, makes inquiries, and re-

<sup>180</sup> *Home Ins. Co. v. McRichards*, 121 Ind. 121; 22 N. E. Rep. 875.

<sup>181</sup> *Thompson v. Phoenix Ins. Co.*, 75 Me. 55; 46 Am. Rep. 357.

<sup>182</sup> *American Ins. Co. v. Crawford*, 7 Ill. App. 29.

<sup>183</sup> *Goodson v. Brooke*, 4 Camp. 163.

<sup>184</sup> *Bradshaw v. Agricultural Ins. Co.* (N. Y. 1892), 42 N. Y. St. Rep. 79.

<sup>185</sup> *Hong Sling v. Scottish Union Nat. L. Ins. Co.*, 7 Utah, 441; 27 Pac. Rep. 171.

<sup>186</sup> *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 110 N. C. 176; 10 S. E. Rep. 1057.

quests an arbitration,<sup>187</sup> nor is a condition as to appraisal waived by the agent and adjuster of the company appearing on the scene of the fire and commencing an examination into the matter of damage.<sup>188</sup> A distinction has been made in many of the cases between an arbitration, in the proper sense of that term, and an appraisal or valuation,<sup>189</sup> and it is held that a forfeiture arising from a breach of other conditions is not waived by insisting upon a condition for arbitration.<sup>190</sup> In so far, however, as the condition or stipulation regarding arbitration may be valid, there would seem to be no reason why it cannot, as well as other conditions, be waived by the company, or its authorized agent with adequate authority to act in the premises.

**§ 601. Agent's Authority—Subrogation.**—An insurance policy provided that on the payment of a loss the company should be subrogated to any right of action arising to the insured against the person whose act or omission occasioned the loss. It appeared that the building in which the insured property was stored stood on land leased from a railroad company, and a contract existed, of which the local agent had knowledge, by virtue of which the lessor was exempted from liability in case of loss by fire communicated from its locomotives, as well as of the fact of the lease. It was held that the court properly refused to charge that such agent could not, without express authority, waive the condition as to subrogation, or that his knowledge of the contract operated as a waiver.<sup>191</sup>

<sup>187</sup> *Briggs v. Firemen's Fund Ins. Co.*, 65 Mich. 52; 31 N. W. Rep. 616.

<sup>188</sup> *Scottish Union etc. Ins. Co. v. Clancey*, 83 Tex. 113; 18 S. W. Rep. 439.

<sup>189</sup> See *Collins v. Collins*, 26 Beav. 306; *Kelly v. Crawford*, 5 Wall. (U. S.) 785.

<sup>190</sup> *Briggs v. Firemen's Fund Ins. Co.*, 65 Mich. 52; 31 N. W. Rep. 616. See *Zimmerman v. Home Ins. Co.*, 77 Iowa, 685; 42 N. W. Rep. 462; *Russell v. Cedar Rapids Ins. Co.*, 78 Iowa, 216; 42 N. W. Rep. 654.

<sup>191</sup> *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 270; 15 S. E. Rep. 562 (10 cases). In this case the court said: "We must keep in mind the well-settled rule that the refusal of a request to charge an abstract principle of law, even though it be correct, unless it appears

§ 602. **Agent's Authority—Time Limit for Suing—Waiver.**—Where a general agent, with authority to act in relation to proofs of loss, misleads the assured so that he delays to bring action within the time limited in the policy therefor, the company is estopped from availing itself of such delay.<sup>192</sup> So where the time limit for suing as provided in the policy was "within one year after the loss," and by the acts and omissions of the insurer's general agent the insured delayed five months in making the preliminary proofs of loss, it was held that that time must be excluded in determining the time within which action must be brought.<sup>193</sup> And where the period limited in the policy for suing has expired, and the company's agent thereafter recognizes its liability, there is waiver of the limitation.<sup>194</sup> So there is a waiver of the limitation clause where the company's agent calls on the assured to adjust the loss, and this is by reason of the requirements of the agent that the assured procure duplicate bills of invoice, delayed beyond the time limited for suing, even though the policy provides that no agent can waive conditions except by indorsement on the policy in writing.<sup>195</sup> And if the insured is led to believe by the company's agent that his claim will be settled without suit, such condition is not enforceable.<sup>196</sup> So the president of the company may waive such limitation, although the policy provides that no agent can waive conditions without special authority, the president being held not within the meaning of the word "agent" in such inhibitory clause.<sup>197</sup> And in case of a foreign

by the testimony applicable to the case, affords no ground for a new trial. What was the scope of the agency in these cases does not appear, and we do not think the question sought to be raised is properly before us. In *New York L. Ins. Co. v. Fletcher*, 117 U. S. 531, it appeared not only that the authority of the agent was limited, but that such limitation was made known to the insured by being embodied in the application which the assured had signed."

<sup>192</sup> *Little v. Phoenix Ins. Co.*, 123 Mass. 380; *Bish v. Hawkeye Ins. Co.*, 60 Iowa, 184; *Brady v. Western Assur. Co.*, 17 U. C. C. P. 597.

<sup>193</sup> *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472.

<sup>194</sup> *Horst v. Insurance Co.*, 73 Tex. 67.

<sup>195</sup> *Dibbrill v. Georgia Home Ins. Co.*, 110 N. C. 193; 14 S. E. Rep. 783.

<sup>196</sup> *Mickey v. Burlington Ins. Co.*, 35 Iowa, 174.

<sup>197</sup> *Universal F. Ins. Co. v. Stewart*, 3 Penny. (Pa.) 536.

company, failure to bring the action within the limited time is excused where no agent can be found upon whom to serve process.<sup>198</sup> So suit may be brought before the time specified where the authorized agent of the company states that it will not pay.<sup>199</sup> So the insured is justified in delaying action until after the period limited expires, where the secretary of the company states in a letter to him that the loss will be paid at a certain date.<sup>200</sup> And such a condition is waived where one of the firm of insurance agents, representing the company, and through which the policy was effected, agreed with the assured that since his partner was absent, the claim would be paid if he would await the absent member's return, which was done.<sup>201</sup> But it is held, however, that the fact that the insured, in consequence of parol declarations of the general agent that it was unnecessary to sue, and that the company would make assessments and pay without suit, is induced to delay bringing suit, that the company is not estopped to avail itself of a breach of such condition, especially where the policy provides that a waiver must be a writing signed by certain officers of the company.<sup>202</sup>

**§ 603. Abandonment to Insurer's Agent.**—As a general rule, an abandonment to the agent of assurers is an abandonment to the insurers,<sup>203</sup> although the known limited character of the agency may preclude the existence of an authority of this kind.<sup>204</sup>

<sup>198</sup> *Peoria Ins. Co. v. Hull*, 12 Mich. 202.

<sup>199</sup> *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 366.

<sup>200</sup> *Ames v. New York Union Ins. Co.*, 14 N. Y. 253. See *Mayor v. Hamilton Ins. Co.*, 39 N. Y. 45.

<sup>201</sup> *Brady v. Western Assur. Co.*, 17 U. C. C. P. 597.

<sup>202</sup> *Waynesboro Mut. F. Ins. Co. v. Conover*, 98 Pa. St. 384; 42 Am. Rep. 618. See *Higgins v. Windsor Co. Mut. F. Ins. Co.*, 54 Vt. 270.

<sup>203</sup> *Fosdick v. Norwich Ins. Co.*, 3 Day (Conn.), 108.

<sup>204</sup> Thus, where an agent at a foreign port is merely authorized to communicate information and give advices affecting insurer's interests, notice of abandonment to such agent is not binding, although even here there seems to be some question. See *Drake v. Maryat*, 1 B. & Cr. 473, per Lord Tenterden; *Read v. Bonham*, 3 Brod. & Bing. 147, 155, per Burroughs, J. Examine the preceding sections of this chapter.

## CHAPTER XXII.

### AGENT OF INSURED.

- § 608. Agent of insured—Authority how conferred.
- § 609. Right of general or special agent.
- § 610. Agency arising from situation with reference to the property.
- § 611. Agency may be created by possession of the policy.
- § 612. Agency: Possession of written application.
- § 613. Agent with general power to insure: Mutual company.
- § 614. Authority of partner.
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- § 634. Authority of agent to make abandonment: Master.
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- § 636. Agent or broker procuring insurance cannot cancel.
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- § 645. Concealment by principal from general agent.
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- § 648. Concealment where agency has ceased.
- § 649. Concealment by agent: False advices: Loss by another peril.
- § 650. Degree of diligence required to communicate information—  
Agent.

**§ 608. Agent of Insured—Authority, how Conferred.**  
An authority to act for another in procuring insurance, or in matters relating thereto, after the policy is effected may be express or implied. It may arise from express directions to insure in behalf of another, or the principal may directly empower another to act in all matters relating to insurances on his property, and both before and after the policy is effected. An authority may be implied from the relation of the parties. It may be a duty arising from the nature of the correspondence with the principal. It may arise from a person's situation with reference to the property or from its peculiar condition. It may exist in cases of special emergency or under peculiar circumstances necessitating immediate action, or by reason of a course of dealing, or by an adoption or ratification, or from possession of the policy;<sup>1</sup> and a party may so employ an agent of the company as to make him his agent.<sup>2</sup>

**§ 609. Right of General or Special Agent to Insure.—**  
In the absence of usage to the contrary, it is not incumbent upon nor has a special or general agent having charge of the principal's business authority as such to insure.<sup>3</sup> So Marshall says: "No general authority which he may have in relation to a ship or goods will make him an agent for the purpose of insuring on behalf of the parties interested."<sup>4</sup> But there is authority for the proposition that a general agent may insure,

<sup>1</sup> See *Smith v. Lascelles*, 2 Term Rep. 187, per Butler J.; *Wallace v. Telfair*, 2 Term Rep. 188, n.; *French v. Reid*, 6 Binn. (Pa.) 308; *Randolph v. Ware*, 3 Cranch (U. S.), 503; *Brisban v. Boyd*, 4 Paige (N. Y.), 17; *Story on Agency*, sec. 190; 1 *Marshall on Insurance*, ed. 1810, 297. See sections next following herein.

<sup>2</sup> See *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497; *Mittenberger v. Beacon*, 9 Pa. St. 198.

<sup>3</sup> *Shurtleff v. Whitfield*, 2 Brev. (S. C.) 71.

<sup>4</sup> 1 *Marshall on Insurance*, ed. 1810, slide p. 297.

without orders therefor, where it is for the interest of his correspondent that he should do so.<sup>5</sup> An agent to procure consignments has no authority to insure for either consignor or consignee. This rule, however, is subject to exceptions;<sup>6</sup> but if the agent has been in the habit of effecting insurances for his principal, or if a prior course of dealing warrants it, or if the universal practice gives such implied authority, the agent would have the right to insure. Again, the control of his principal's funds and the general superintendence and management of his affairs would give the right to procure the necessary insurances. An absolute discretion vested in the agent as to the disposal of goods consigned, and as to the mode and time of investing and returning the proceeds, raises an inference of implied authority to insure return cargoes. Thus, a general agent employed by a foreign merchant to procure consignments and make shipments or advances on the latter's behalf, having absolute discretion as to the selection of persons, time, goods, and vessels, may insure, and if by the terms of the agreement it is made his duty to insure, he should do so.<sup>7</sup> An agent may procure substitute insurance upon property after cancellation of a policy, and this without previous notice to principal.<sup>8</sup>

**§ 610. Agency Arising from Situation with Reference to the Property.**—A person's situation with reference to the property of another may operate to establish an agency in connection therewith. Thus, a consignee whose open policy covers property of his consignor is the latter's agent in reference to the insurance, and may thereby be authorized to receive payment of the amount due his principal.<sup>9</sup>

<sup>5</sup> *Wolfe v. Horncastle*, 1 Bos. & P. 316. See remarks upon this case, 2 Duer on Insurance, ed. 1846, p. 111, sec. 10.

<sup>6</sup> *Randolph v. Ware*, 3 Cranch (U. S.), 503, per Patterson, J.

<sup>7</sup> Substantially the same illustrations as are given in 2 Duer on Insurance, ed. 1845, 112, 113. See *Schimmelpennick v. Bayard*, 1 Pet. (U. S.) 275.

<sup>8</sup> *Buick v. Mechanics' Ins. Co.*, 103 Mich. 75; 61 N. W. Rep. 337; 24 Ins. L. J. 375.

<sup>9</sup> *Ballard v. Merchants' Ins. Co.*, 9 La. 258; 29 Am. Dec. 444.

**§ 611. Agency may be Created by Possession of the Policy.**—An agency may be created in behalf of the insured by a delivery to or retention of the policy by the agent. Mere possession, however, of the policy does not necessarily, in itself alone, warrant an implied authority to act in the interests of the insured in all matters connected therewith. Particular circumstances may exist, or it may have been given the agent for a special purpose, or it may have come into his hands through another party. These and other facts, such as past and subsisting relations of the parties, general usage or the course of dealings between them, and the character of the agent's business, are important circumstances bearing upon the agent's authority to act in relation to the principal's interest thereunder.<sup>10</sup> In England, if the policy is left in the broker's hands, he is intrusted with the adjustment of the loss.<sup>11</sup>

**§ 612. Agency—Possession of Written Application.**—The possession of a written application for insurance raises an implication of authority to act for the applicant in negotiating a policy, and, in the absence of evidence to the contrary, renders the party the agent of the insured so far as notice of facts material to the risk is concerned.<sup>12</sup> So where a party remains in possession of the policy after its execution, he alone is entitled to recover therein in case of loss, and the insurer issuing the policy and dealing with such party only has the right to assume that the latter has authority to consent to changes in the policy for the benefit of the assured.<sup>13</sup>

**§ 613. Agent with General Power to Insure—Mutual Company.**—It is held that an agent with general power to

<sup>10</sup> See 2 Phillips on Insurance, 3d ed. 543, sec. 1881; Bethune v. Nelson, 2 Caines (N. Y.), 139; Gray v. Murray, 3 Johns. Ch. (N. Y.) 67; Borisfield v. Cresswell, 2 Camp. 545; Lightbody v. North American Ins. Co., 23 Wend. (N. Y.) 18; Dutleigh v. Gatiliff, 4 Dall. (C. C.) 446; Chesapeake Ins. Co. v. Stark, 6 Cranch (U. S.), 268; Cassidy v. Louisiana Ins. Co., 6 Mart. (La., N. S.) 421; Power v. Butcher, 10 Barn. & C. 328; 5 Man. & R. 327; Shee v. Clarkson, 12 East, 507.

<sup>11</sup> 1 Arnould on Marine Insurance, Perkins' ed. 1850, 126, sec. 65. Examine 1 Id., MacLachlan's ed., 1887, 211, 224. See secs. 517, 523, herein.

<sup>12</sup> Fane Ins. Co. v. Mann, 4 Ill. App. 485.

<sup>13</sup> Martin v. Tradesman's Ins. Co., 101 N. Y. 502.



obtain insurance cannot effect a policy in a mutual company. The theory upon which this decision rests is that of the relations which parties insuring in mutual companies sustain to each other, whereby every member becomes insurer to every other member.<sup>14</sup>

§ 614. **Authority of Partner.**<sup>15</sup>—One partner may insure in his own name his undivided interest in the partnership,<sup>16</sup> and a policy in the name of a single partner without general words limits the contract to his undivided share, and no action lies on the policy in the firm's name.<sup>17</sup> A partner has authority to insure the firm property in the name or, by general words, on account of the firm, or he may direct such insurance to be effected,<sup>18</sup> for he has an insurable interest in the entire partnership stock, and, in case of a loss, he must account to the firm for such sums as he receives under the policy.<sup>19</sup> But a partner has no authority to effect insurance for account of other part owners, unless the business be a partnership and the insurance is made in the partnership name.<sup>20</sup> And an insurance effected by a member of a partnership "on his new hotel" only covers his legal interest therein, it being partnership property, where it does not appear that he intended to insure any equitable interest he might have therein against

<sup>14</sup> *White v. Madison*, 26 N. Y. 117.

<sup>15</sup> See secs. 944, 945, herein.

<sup>16</sup> 3 Kent's Commentaries, 5th ed. 258; *Graves v. Boston Marine Ins. Co.*, 2 Cranch (U. S.) 419, 440.

<sup>17</sup> *Graves v. Boston M. Ins. Co.*, 2 Cranch (U. S.), 419. See *Cohen v. Hannam*, 5 Taunt. 101. See *Pierson v. Lord*, 6 Mass. 81; *Bell v. Ansley*, 16 East, 141; *Carruthers v. Sheddon*, 6 Taunt. 14; *Lawrence v. Sebor*, 2 Calnes (N. Y.), 203; *Turner v. Burrows*, 5 Wend. (N. Y.) 541; *Hibbert v. Martin*, 1 Camp. 538.

<sup>18</sup> *Hooper v. Lusby*, 4 Camp. 66; *Osgood v. Glover*, 7 Daly (N. Y.), 367; *Phoenix Ins. Co. v. Hamilton*, 14 Wall. (U. S.) 504; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85; *Lawrence v. Van Horne*, 1 Calnes (N. Y.), 276; *Graves v. Boston M. Ins. Co.*, 2 Cranch (U. S.), 419; *Lawrence v. Sebor*, 2 Calnes (N. Y.), 203; *Hillock v. Traders' Ins. Co.*, 54 Mich. 531; *Parsons on Partnership*, 4th ed., sec. 119; 1 *Lindley on Partnership*, ed. 1891, 139; *Story on Partnership*, secs. 101, 102.

<sup>19</sup> *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; 98 Am. Dec. 332.

<sup>20</sup> *Hooper v. Lusby*, 4 Camp. 66.

his partner on adjustment of the firm's affairs;<sup>21</sup> although it is held that a partner may insure on his own account, in his own name, the whole stock to its full value.<sup>22</sup> If a partner assures "on account of whom it may concern" a cargo belonging to the firm, and makes any loss which may occur payable to himself, he may sue on the policy in his own name.<sup>23</sup> Where the partnership is a special one, limited to a special purpose, and the whole control of a voyage or adventure is given to a particular partner, he has, by virtue of his general authority, the right to insure for the benefit of all.<sup>24</sup> So a partner who has a lien on the goods by reason of advances may insure a cargo in his own name to the full value.<sup>25</sup> In an English case it is held that if a partner effects a policy on the firm's account through a broker, the members are all liable to the latter for premiums and commissions.<sup>26</sup> The course of dealing there between the insured, the broker, and the underwriter differs from that in the United States.

**§ 615. Authority of Part Owner.**<sup>27</sup>—A part owner in a vessel has no authority as such to insure for his co-owners, so as to bind them or charge the joint proceeds therewith, unless they consent or the ship be partnership property;<sup>28</sup> but he may insure his actual interest in the ship,<sup>29</sup> even though he do not state to the underwriter its nature and extent.<sup>30</sup> If, however,

<sup>21</sup> *Ralley v. Hope Ins. Co.*, 56 Me. 474.

<sup>22</sup> *Millaudon v. Atlantic Ins. Co.*, 8 La. 557.

<sup>23</sup> *Volson v. Commercial Mut. Ins. Co.* (N. Y. 1891), 41 N. Y. 884.

<sup>24</sup> *Lawrence v. Sebor*, 2 Calnes (N. Y.), 203.

<sup>25</sup> *Millaudon v. Atlantic Ins. Co.*, 8 La. 557.

<sup>26</sup> *Hooper v. Lushy*, 4 Camp. 66.

<sup>27</sup> See secs. 944-46, herein.

<sup>28</sup> *Finney v. Fairhaven Ins. Co.*, 5 Met. (Mass.) 192; 38 Am. Dec. 397; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85; *Lindsley v. Gibbs*, 28 L. J. Ch. 692; *Blanchard v. Waite*, 38 Me. 51; 48 Am. Dec. 474; *Bell v. Humphries*, 2 Stark. 345; *Graves v. Boston M. Ins. Co.*, 2 Cranch (U. S.) 319; *French v. Backhouse*, 5 Burr. 2727; *Hooper v. Lushy*, 4 Camp. 66; *Sawyer v. Freeman*, 35 Me. 542; *Turner v. Burrows*, 5 Wend. (N. Y.) 541; *Reid v. Pacific Ins. Co.*, 1 Met. (Mass.) 106; *Holmes v. United States Ins. Co.*, 2 Johns. Cas. (N. Y.) 329.

<sup>29</sup> *Finney v. Bedford Ins. Co.*, 8 Met. (Mass.) 348.

<sup>30</sup> *Finney v. Warren Ins. Co.*, 1 Met. (Mass.) 16; 35 Am. Dec. 343.

See also *Lawrence v. Van Horne*, 1 Calnes (N. Y.), 276; *Tappan v. Joyce*, Vol. I.—48

he insures as owner, or a policy be taken upon the whole vessel in his own name without previous authority or subsequent ratification by the other owners, it is invalid, except as to the interest of the part owner obtaining it,<sup>31</sup> and he cannot recover anything for the shares or interests of his co-owners.<sup>32</sup> And even if the policy be intended by the insurer to cover the whole vessel for the benefit of all concerned, but is invalid except as to the interest of the part owner procuring it, the insurer is only liable to such part owner for such a portion of the sum insured as his interest bears to the whole.<sup>33</sup> But one part owner may insure the ship for the interest of all, where they are partners and an order is given by one to insure;<sup>34</sup> and a part owner of a vessel who has chartered the remaining portion, with a covenant to pay the value in case of a loss, may insure the whole vessel as his property.<sup>35</sup> So if he does not own the whole vessel insured he may recover for an undivided interest held in his own right, and also for another undivided interest held by him as administrator of a deceased co-owner.<sup>36</sup> Where A purchased the whole of a cargo, in which B was to be interested one-third, and which was charged to him by A, and the invoices and bills of lading being made out in their joint names, and some time after B directed his correspondent to place the proceeds of the cargo to the credit of A, it was held that A had not such a lien on the one-third belonging to B as amounted to an insurable interest, nor could A, who had insured the whole and had averred an interest in the whole cargo, recover for more than two-thirds.<sup>37</sup> Insurance of a vessel by one part owner for all may be ratified by the others, even after a loss by suing on the policy;<sup>38</sup> and if an express authority to make

Atkinson, 2 Mass. 365; *Murray v. Colorado Ins. Co.*, 11 Johns. (N. Y.) 302.

<sup>31</sup> *Knight v. Eureka M. Ins. Co.*, 26 Ohio St. 664; 20 Am. Rep. 778.

<sup>32</sup> *Finney v. Warren Ins. Co.*, 1 Met. (Mass.) 16; 35 Am. Rep. 343; *Dumas v. Jones*, 4 Mass. 647; *Pearson v. Lord*, 6 Mass. 81.

<sup>33</sup> *Knight v. Eureka M. Ins. Co.*, 26 Ohio St. 664; 20 Am. Rep. 778.

<sup>34</sup> *Hooper v. Lushby*, 4 Camp. 66.

<sup>35</sup> *Oliver v. Greene*, 3 Mass. 133; 3 Am. Dec. 96.

<sup>36</sup> *Finney v. Warren Ins. Co.*, 1 Met. (Mass.) 16; 35 Am. Dec. 343.

<sup>37</sup> *Murray v. Columbian Ins. Co.*, 11 Johns. (N. Y.) 302.

<sup>38</sup> *Finney v. Fairhaven Ins. Co.*, 5 Met. (Mass.) 192; 38 Am. Dec. 397.

the insurance or a subsequent ratification be shown, a recovery may be had.<sup>39</sup> In a Massachusetts case one of three part owners and also master of a brig directed a broker to insure property on board for a certain voyage, and by the order it was intended to insure the interests of all the owners. It did not appear that the other part owners had authorized such insurance, either originally or by ratification, and neither was there any evidence of their disaffirmance of the broker's acts. It was decided that the insurance covered only the interest of the part owner directing the insurance, and not the interests of the others.<sup>40</sup> If one part owner insures for the others, a ratification of his act is shown by the others signing a note for the premium and commencing an action for the loss.<sup>41</sup> In an English case the part owners and managing owners directed insurance; the broker who executed the order sued the other part owners for the premium, and it was held, in the absence of proof of distinct authority by the part owners sued to effect the insurance, that they were not liable, although it was claimed that they had received the benefit of the insurance, and that the managing owners could not authorize insurance for other part owners.<sup>42</sup> If a part owner, without authority, insures in his own name the whole interest, and recovers only for his separate interest, the other part owners have no claim against him for any portion of the money received for the loss.<sup>43</sup>

**§ 616. Authority of Joint Owner.**<sup>44</sup>—Joint owners have not the authority of partners, and where the ownership is that of vessels, they are not partners in matters concerning their management.<sup>45</sup> And it is held in New York<sup>46</sup> that ship-

<sup>39</sup> *Blanchard v. Walte*, 33 Me. 51; 48 Am. Dec. 474.

<sup>40</sup> *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85.

<sup>41</sup> *Blanchard v. Walte*, 28 Me. 51; 48 Am. Dec. 474.

<sup>42</sup> *Bell v. Humphries*, 2 Stark. 385, per Lord Ellenborough.

<sup>43</sup> *Garrel v. Hanna*, 5 Har. & J. (Md.) 412.

<sup>44</sup> See sec. 944, herein.

<sup>45</sup> *Adams v. Carroll*, 85 Pa. 209; *Green v. Briggs*, 6 Hare, 395; *French v. Price*, 24 Pick (Mass.) 13, 18; *Knowlton v. Reed*, 38 Me. 246; *Ward v. Bodeman*, 1 Mo. App. 272; *Patterson v. Chalmers*, 7 B. Mon. (Ky.) 595.

<sup>46</sup> *Nicoll v. Munford*, 4 Johns. Ch. (N. Y.) 522.

owners are tenants in common of the vessel, and not joint tenants or partners. So one of two joint shippers has no authority as such to insure for both,<sup>47</sup> although they may form a special partnership.<sup>48</sup> And it is held that part owners by employment of a ship become partners in respect of the adventure.<sup>49</sup> But if the entire direction and management of the vessel, or of the cargo or joint adventure, devolves by consent upon one of the parties so justly interested, it would seem that he has the right to effect insurance for all, for it is held that such parties have all the rights of general partners.<sup>50</sup> The interest of other joint owners is not covered by a policy in the name of one joint owner, "as property may appear," without the clause stating that the insurance is for the benefit of all concerned.<sup>51</sup> Where one of two persons who owned goods jointly sought to effect an insurance thereon, and the insurance agent informed the owner that to insure the interest of both there was no necessity for placing both names in the policy, and the policy was issued in the name of one, it was held that upon a total loss the whole interest might be recovered by the party to whom the policy had been issued.<sup>52</sup>

**§ 617. Authority of Tenant in Common.**—One tenant in common of a vessel cannot, without authority, procure insurance on property on board for his cotenants.<sup>53</sup> He can insure only for his individual share, or for the benefit of those by whose order or direction it is effected.<sup>54</sup>

<sup>47</sup> *Lawrence v. Sebor*, 2 Caines (N. Y.), 203. See *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85, and section last preceding.

<sup>48</sup> *Hardy v. Sproule*, 29 Me. 258; *Munford v. Nicoll*, 20 Johns. (N. Y.) 611; *Holderness v. Shackels*, 8 Barn. & C. 612, 618; *Hinton v. Law*, 10 Mo. 701.

<sup>49</sup> *Bovill v. Hammond*, 6 Barn. & C. 149.

<sup>50</sup> See *Compston v. McNair*, 1 Wend. (N. Y.) 457, per the Court.

<sup>51</sup> *Peoria Ins. Co. v. Hall*, 12 Mich. 202. See *Graves v. Boston M. Ins. Co.*, 2 Cranch (U. S.), 419.

<sup>52</sup> *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227.

<sup>53</sup> *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 86.

<sup>54</sup> *French v. Backhouse*, 5 Burr. 2727; *Roberts v. Ogilby*, 9 Price, 269; *Bell v. Humphries*, 5 Burr. 2727; 2 Stark. 345; *Holmes v. U. Ins. Co.*, 2 Johns. Cas. (N. Y.) 329.

§ 618. **Authority of Ship's Husband.**—The ship's husband cannot borrow money, give a lien on the freight, make insurance, or buy a cargo, without special authority;<sup>55</sup> nor has he any authority to insure either the whole or any part of the vessel without the express direction of the owner thereof, or a general direction from all,<sup>56</sup> and if he does insure, no recovery can be had for advances in effecting the contract, unless it be proven that the several owners authorized his acts.<sup>57</sup> In an English case a ship's husband was appointed to that office by a deed executed by all the joint owners, empowering him to do acts as such husband in the customary manner. He effected insurance on the ship and brought an action against a part owner for the premium. It was held that the husband's authority to insure for any part owner must arise from a particular direction; or, if an authority to insure for all the owners was claimed, then a general direction to insure, or something equivalent thereto, must be given, and that a direction by a part owner to insure did not bind the rest. But that information given, of the insurance being effected, to all the owners, and their failure to object, was decided to have bound them.<sup>58</sup>

§ 619. **Agent Effecting Insurance "for Whom it May Concern."**—An insurer is entitled to know when he insures, or that he insures unknown persons, so as to know what terms to make;<sup>59</sup> but the insurer need not know the persons entitled to claim under a policy "for whom it may concern."<sup>60</sup> A policy "for whom it may concern" supposes an agency, and he for whose benefit the insurance is procured is the principal, the person contemplated in the contract.<sup>61</sup> A policy "on ac-

<sup>55</sup> The Ole Olson, 20 Fed. Rep. 384.

<sup>56</sup> Turner v. Burrows, 8 Wend. (N. Y.) 144; affirming 5 Wend. (N. Y.) 541, French v. Backhouse, 5 Burr, 2727; McCready v. Woodhull, 34 Barb. (N. Y.) 80; Finney v. Warren Ins. Co., 1 Met. (Mass.) 16; Bell v. Humphries, 2 Stark. 345.

<sup>57</sup> McCready v. Woodhull, 34 Barb. (N. Y.) 80.

<sup>58</sup> French v. Backhouse, 5 Burr. 2727.

<sup>59</sup> Dumas v. Jones, 4 Mass. 647.

<sup>60</sup> The Sidney, 23 Fed. Rep. 88.

<sup>61</sup> Newson v. Douglass, 7 Har. & J. (Md.) 417, per Buchanan, J. "He who effects insurance or causes himself to be insured by name

count of ———" is equivalent to a policy "for whom it may concern." The real party in interest may be shown by proof aliunde, and one interested has an action to recover his proportion of a loss paid to others.<sup>62</sup> So where the party effecting insurance signs himself as agent, parol evidence is admissible to show for whom the insurance was really effected.<sup>63</sup> But it is held that where forwarders of wheat insure it in their own names, parol evidence is inadmissible to show that the insurance was for the benefit of "whom it may concern."<sup>64</sup> The rule in these cases is undoubtedly this, that if a policy is issued "for account of whom it may concern," it is not only to be limited to those who have an insurable interest in the property, which may be lawfully insured, but must also be restricted to the party or parties for whom the insurance was intended, and by whom it was previously authorized or subsequently adopted, and not any and every person who may chance to have an interest in the property. This rule, has, however, been qualified in some decisions.<sup>65</sup> Referring to the point as to who may claim

for the account of another is not bound in his own name; nevertheless the ordinary practice is opposed to this, and we know that in commerce custom is easily victorious over legal theory": Emerigon on Insurance, Meredith's ed. 1850, c. v., sec. 3, p. 110. "In every country in Europe, with the possible exception of England, the person named as the assured in the policy may recover a loss upon proof of his insurable interest. It is presumed that the interest proved was the interest meant to be insured": 2 Duer on Insurance, ed. 1846, sec. 28, pp. 42, 43.

\* *Burrows v. Turner*, 24 Wend. (N. Y.) 276.

\* *Davis v. Boardman*, 12 Mass. 80; *Hibbert v. Martin*, 1 Camp. 538. See *Lawrence v. Sebor*, 2 Caines (N. Y.), 203; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55.

\* *The Sidney*, 23 Fed. Rep. 88.

\* See *Frierson v. Brenham*, 5 La. Ann. 542; 52 Am. Dec. 603; *Irving v. Richardson*, 2 Barn. & Adol. 193; *Foray v. Atlantic Mut. Ins. Co.*, 2 Rob. (N. Y.) 79; *Baudrey v. Union Ins. Co.*, 2 Wash. (C. C.) 391; *Newson v. Douglass*, 7 Har. & J. (Md.) 417; *Routh v. Thompson*, 11 East, 428; 13 East, 274; *Lawrence v. Sebor*, 2 Caines (N. Y.), 203; *Grant v. Hill*, 4 Taunt. 390; *Duncan v. China Mut. Ins. Co. (N. Y. C. A. 1892)*, 41 N. Y. St. Rep. 368; 29 N. E. Rep. 76; *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151; *Lawrence v. Van Horne*, 1 Caines (N. Y.), 276; *The Sidney*, 23 Fed. Rep. 88; *Alliance M. Ins. Co. v. State Ins. Co.*, 8 La. 1; *Hancox v. Fishing Ins. Co.*, 3 Sum. (C. C.) 142; *Lee v. Massachusetts F. & M. Ins. Co.*, 6 Mass. 208; *Bell v. Jansen*, 1 Maule

under this clause, it is said. "They must be persons who at some time or other during the risk have an insurable interest in the property, the original parties and their assignees. Beyond this it must be shown that the person giving the order to effect the insurance either intended it for their benefit, or at all events did not intend it exclusively for the benefit of others having a conflicting or inconsistent interest, but that it was meant to apply generally, so as to cover the interest of those who should ultimately appear concerned; if this be shown, a subsequent adoption of the policy by the parties so intended to be insured, or so appearing ultimately to be concerned in interest will be held equivalent to a previous order, and entitle them, under the words of the general clause, to avail themselves of the benefit of the insurance. The intention at the time of the party who directs the insurance to be effected is the great point to be ascertained in determining whose interests the policy can be applied to protect. . . . Where the intention of the party directing the insurance is to embrace the interests of any person whatever who may ultimately appear to be concerned, there can be no doubt that any person coming within that category who subsequently chooses to adopt the policy may obtain the benefit of it. . . . The true rule, then, would appear to be, that any party to whom an interest in the property insured 'doth, may, or shall appertain' at any time during the pendency of the risk, may under the general words, by subsequent adoption, take advantage of the policy to protect such interest, unless it appears from extrinsic evidence that the person directing the policy to be effected intended at the time so to confine the insurance as not to embrace such interest." <sup>66</sup> So again, Mr. Arnould says: "As no act of one man can be ratified by another unless that other is cognizant of what has previously been

& S. 202. The clause used in the United States, "himself or whom it may concern," is equivalent to the English clause, "as well in his own name as in the name and names of all persons whatsoever to whom the same may in any way appertain": 1 Phillips on Insurance, 3d ed., 212, sec. 382; 2 Duer on Insurance, ed. 1845, p. 29, sec. 21. But see *Henshaw v. Mutual S. Ins. Co.*, 2 Blatchf. (C. C.) 99. Examine *Mosser v. Donaldson* (Pa. 1887), 10 Atl. Rep. 766; secs. 901, 903, herein.

\* 1 Arnould on Marine Insurance, MacLachlan's ed. 1887, 110-12.



done, so the party for whom the insurance is intended to be made cannot by any after authority to insure be considered to adopt the previous insurance, unless at the time of giving such authority he knew as a fact that the prior insurance had been made. This, indeed, is so plain on principle that it requires no authority to enforce it."<sup>67</sup> Mr. Phillips says: "A policy made in the name of a particular person 'for whom it may' concern,' or with any other equivalent clause, will be applied to the interest of the party or parties, and only the party or parties for whom it is intended by the person who effects it, if such party has authorized its being made beforehand or subsequently adopts it."<sup>68</sup> Mr. Duer says: "The terms used, however broad and comprehensive, must also be restricted to those for whom the insurance was in fact intended, and by whom it was previously directed or authorized, or subsequently in due season adopted. All other parties, though they may equally fall within the description in the policy, are not parties, but strangers to the contract."<sup>69</sup> If the words "for whom it may concern" are not used, but words of similar import, it is held that none but the persons named can claim the indemnity,<sup>70</sup> and where such a policy is effected without any warranty or representation of national character, it will cover the interest of any person, whether an American or foreigner, who has authorized the insurance,<sup>71</sup> and parol evidence is admissible to show the parties intended under such clause.<sup>72</sup> And such a policy, where there is no warranty of neutrality, includes the property of belligerents, as well as that of Americans.<sup>73</sup> So where an agent describes himself in the policy as the agent of a particular person, the principal so named is protected.<sup>74</sup> And where the policy

<sup>67</sup> 1 Arnould on Marine Insurance, Perkins' ed. 1850, 169, \*168.

<sup>68</sup> 1 Phillips on Insurance, 3d ed., 213, et seq., secs. 383-85.

<sup>69</sup> 2 Duer on Marine Insurance, ed. 1845, p. 30, et seq., sec. 22, et seq. See, also, 2 May on Insurance, 3d ed., sec. 452 e.

<sup>70</sup> Newson v. Douglass, 7 Har. & J. (Md.) 417.

<sup>71</sup> Seamans v. Loring, 1 Mass. 127.

<sup>72</sup> Bell v. Western M. Ins. Co., 5 Rob. (La.) 423, 442.

<sup>73</sup> Hodgson v. Marine Ins. Co., 5 Cranch (U. S.), 100.

<sup>74</sup> Russell v. N. E. M. Ins. Co., 4 Mass. 82. See Holmes v. United States Ins. Co., 2 Johns. Cas. (N. Y.) 329. See Dumas v. Jones, 4 Mass. 647; Newson v. Douglass, 7 Har. & J. (Md.) 417.

is "for account of whom it may concern," payable to A or order, an action may be brought by A in his own name for the benefit of other owners,<sup>75</sup> and the whole amount being collected, he holds as trustee for the others, so far as their interests are concerned.<sup>76</sup> And generally, where an agent or broker insures in his own name on account of a third person named in the policy, or if the assured be described by general words therein, suit may be brought, either in the principal's name or that of the agent or broker effecting the policy.<sup>77</sup> And in such case action may be maintained by the real owners of the property, although the by-laws of the company provide that none but members of the company shall be insured therein,<sup>78</sup> for not only the interest of the person named is covered, but also that of any other person contemplated who has an interest, and who has authorized the insurance;<sup>79</sup> and there is notice to the insurers where a policy is effected in the name of one "for whom it may concern" that other interests were intended to be covered.<sup>80</sup> An agent insuring for the principal and suing in his own name may recover to the extent of his interest where the principal has not ratified the contract.<sup>81</sup> Where a policy against fire insured two individuals by name, and the words "or whom it may concern" were added, and a clause was inserted that the loss, if any occurred, should be paid to the individuals named, it was held that an action might

<sup>75</sup> *Walsh v. Washington etc. Ins. Co.*, 3 Rob. (N. Y.) 202 (under code provision).

<sup>76</sup> *Protection Ins. Co. v. Wilson*, 8 Ohio St. 553.

<sup>77</sup> *Davis v. Boardman*, 12 Mass. 80; *Dugan v. United States*, 3 Wheat. (U. S.) 172; *Somers v. Equitable Safety Ins. Co.*, 12 Gray (Mass.), 531; *Browning v. Provincial Ins. Co.*, L. R. 5 P. C. 263; *Sargent v. Morris*, 3 Barn. & Ald. 277; *Stetson v. Insurance Co.*, 4 Phila. (Pa.) 8; *Provincial Ins. Co. v. Ledue*, L. R. 6 P. C. 224; *Copeland v. Merchants' Ins. Co.*, 6 Pick. (Mass.) 198; *Farmer v. Comm. Ins. Co.*, 18 Pick. (Mass.) 53; *Pacific Ins. Co. v. Callett*, 4 Wend. (N. Y.) 75; *Spring v. S. C. Ins. Co.*, 8 Wheat. (U. S.) 268; *Jefferson v. Cotheal*, 7 Wend. (N. Y.) 82; *Protection Ins. Co. v. Wilson*, 6 Ohio St. 553.

<sup>78</sup> *Somes v. Equitable etc. Ins. Co. v. Wilson*, 12 Gray (Mass.), 531.

<sup>79</sup> *Seamans v. Loring*, 1 Mason (C. C.), 127; *Lawrence v. Sebor*, 2 Caines (N. Y.), 203.

<sup>80</sup> *Bell v. Western M. & F. Ins. Co.*, 5 Rob. (La.) 423.

<sup>81</sup> *Foster v. United States*, 11 Pick. (Mass.) 85.

be maintained in their names, and that they were entitled to recover the whole sum insured, though it appeared that they were owners of but one-half of the building insured, and that the other half belonged to a third person not joined as plaintiff.<sup>82</sup> If an agent, acting under instructions, effects an insurance, the interpretation of the policy must be controlled by the intention of the principal in every case where evidence is admissible concerning the facts, and it will then protect the interest it was intended to embrace, but where there is no prior authority given the agent, his intention limits the application of the general words.<sup>83</sup> Although no previous authority be given, the owners or parties whose interests were intended to be covered may ratify assured's agent's acts and take the benefit of the insurance;<sup>84</sup> and in a policy obtained "for whom it may concern" the ratification of the principal may be presumed, if it is for his benefit,<sup>85</sup> and the adoption or ratification of the agent's act by the intended party may take place after loss.<sup>86</sup> But a previous direction to insure or a ratification must be shown by the party who seeks to recover as principal.<sup>87</sup> and parol evidence is admissible to show the intention.<sup>88</sup> But evidence that insured generally effected insurance for the benefit of all their customers does not sufficiently prove an interest.<sup>89</sup>

<sup>82</sup> *Jefferson Ins. Co. v. Cotheal*, 7 Wend. (N. Y.) 72; *Snyders v. Farmers' Ins. & Loan Co.*, 13 Wend. (N. Y.) 92; s. c., 16 Wend. (N. Y.) 481.

<sup>83</sup> 2 Duer on Insurance, ed. 1846, p. 38, sec. 25.

<sup>84</sup> *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606.

<sup>85</sup> *Fleming v. Marine Ins. Co.*, 4 Whart. (Pa.) 59; *De Bolle v. Pennsylvania Ins. Co.*, 4 Whart. (Pa.) 68.

<sup>86</sup> *Hooper v. Robinson*, 98 U. S. 528; *Herkimer v. Rice*, 27 N. Y. 163.

<sup>87</sup> *Alliance Mar. Assur. Co. v. Louisiana State Ins. Co.*, 8 La. 1; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85; *Sleeper v. Union Ins. Co.*, 61 Me. 267; *Frierson v. Brenham*, 5 La. Ann. 540; 52 Am. Dec. 603.

<sup>88</sup> *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85; *Paradise v. Sun Mut. Ins. Co.*, 6 La. Ann. 526; *Shawmut Sugar Co. v. Hampden Mut. Ins. Co.*, 12 Gray (Mass.), 540; *Sanders v. Hillsborough Ins. Co.*, 44 N. H. 238.

<sup>89</sup> *Steele v. Franklin F. Ins. Co.*, 17 Pa. St. 290. The statute 25 George III., chapter 44, provided that the name of the party interested or that of his agent should appear in the policy: See *Pray v. Edle*, 1 Term Rep. 313. This statute was repealed by 28 George III., chapter 56, under which only the party's name who effected the

§ 620. **Right of Agent to Insure in Case of Emergency.**—An implied agency may arise from necessity, by virtue of which the agent may insure for his principal, as in case where goods ordered from a foreign correspondent, and being in excess of the order, are refused to be received; in such case the merchant ordering the goods may reship the same, and insure them on account of the correspondent and also for his own security.<sup>90</sup> So an agent or trustee in possession of property, expressly vested with discretion as to its management and disposal, and authorized to act in relation thereto as his best judgment may deem to be for the best interests of his principal, has the power to effect insurance thereon where he has no opportunity to receive his principal's instructions, and the same is true where there exists a reasonable inference that the matter was left to his discretion, or where, by reason of pursuing a particular course, the property is exposed to perils which could not have been foreseen by the principal, and is therefore not embraced in any prior insurance.<sup>91</sup> And it has been held that a mere forwarding agent may, under certain circumstances, effect an insurance, as where the agent believes the property would be otherwise unprotected.<sup>92</sup> And a consignee with goods on hand may be authorized to insure by delay in the market.<sup>93</sup> Somewhere there is a consignee to whom the general agent of a foreign merchant has been directed to transmit bills of lading, that he might effect a policy, and such consignee refuses to accept the goods, the general agent may insure.<sup>94</sup>

policy need appear: See *Hibbert v. Martin*, 1 Bos. & P. 346, n. As to the effect of the law of 1785 in England, 25 George III., chapter 44; and the causes which led to its repeal by the statute, 28 George III., chapter 56; and the construction of the latter act, see 2 Duer on Insurance, ed. 1846, p. 10, et seq.

<sup>90</sup> *Cornwall v. Wilson*, 1 Ves. Sr. 511, per Lord Hardwicke.

<sup>91</sup> *De Forest v. Fulton Ins. Co.*, 1 Hall (N. Y.), 84, per Jones, C. J.; *Cornwall v. Wilson*, 1 Ves. Sr. 511; 2 Duer on Insurance, ed. 1846, pp. 114, 115, sec. 11.

<sup>92</sup> *Robertson v. Hamilton*, 14 East, 522, per Lord Ellenborough. But see 2 Duer on Insurance, ed. 1846, p. 102, et seq.

<sup>93</sup> *De Forest v. Fulton Ins. Co.*, 1 Hall (N. Y.), 84. See criticism of this case in 2 Duer on Insurance, ed. 1845, 160, note 2.

<sup>94</sup> *Wolf v. Horncastle*, 1 Bos. & P. 316.

§ 621. **Agency Arising from Custom or Course of Dealing.**—A general agent or consignee may be authorized by the usage or the general custom of merchants, or by a course of business between the parties, or by the usage of a particular trade to which his agency and the course of business relates, to effect an insurance.<sup>95</sup> As to the duty of a merchant from whom goods are ordered to insure them, if the dealings between the parties for a long time have been that the party ordering the goods has never directed them insured, and the custom of the place where they are ordered has never been to insure goods under such circumstances, the course of dealings between the parties control their rights, and evidence of a custom to insure at other places is inadmissible in such case.<sup>96</sup> If a merchant is accustomed to effect insurances for his correspondent, and neglects to effect an order to insure, he makes himself the insurer, and may recover the premium.<sup>97</sup> And in general, an authority to act for another in a foreign country implies the power to transact the business in accordance with the general customs and laws of such place.<sup>98</sup>

§ 622. **Del Credere Agents.**—An agent is not bound for the solvency of the insurers unless there is an agreement therefor, or unless he has been guilty of fraud or special negligence. But if an agent guarantees the solvency of the underwriters, he may become liable for the loss.<sup>99</sup> This last a del credere agent does. His relation, generally, to his principal is that of debtor or creditor, and he must see that the latter is paid.<sup>100</sup> He receives higher commissions as an addi-

<sup>95</sup> 2 Duer on Insurance, ed. 1845, 127; *De Forest v. Fulton Ins. Co.*, 1 Hall (N. Y.), 84. See criticism of this case in 2 Duer on Insurance, ed. 1845, 160, note 2; *French v. Reed*, 6 Binn. (Pa.) 308; *Brisbain v. Boyd*, 4 Paige Ch. (N. Y.) 17, per Walworth, C.; *Story on Agency*, sec. 190.

<sup>96</sup> *Walsh v. Frank*, 19 Ark. 270.

<sup>97</sup> *Morris v. Cummerl*, 2 Wash. (C. C.) 203.

<sup>98</sup> *Owings v. Hull*, 9 Pet. (U. S.) 607, 627.

<sup>99</sup> *Emerigon on Insurance*, Meredith's ed. 1856, c. v, sec. 7, p. 118; *Id.*, c. viii, sec. 15, pp. 205, 206.

<sup>100</sup> *Lewis v. Brehme*, 33 Md. 412; 3 Am. Rep. 190. There is no priv-

tional consideration for the extra risk incurred, and is liable in case of the underwriter's insolvency after demand made upon the latter and nonpayment, for he guarantees the payment of every sum due under the policy.<sup>101</sup> It was held at one time, however, that such agent was responsible to his principal in the first instance.<sup>102</sup> Such agreements are not within the statute of frauds; they are an original undertaking, and may be assumed by parol.<sup>103</sup> Such agent may recover the commissions *del credere* as soon as the guaranty is made, and is not compelled to await the result thereof.<sup>104</sup> In case the loss be paid by him to the principal, he may bring an action in the name of the assured against the underwriter, or, if the policy be effected in his own name, then he may sue in his own name.<sup>105</sup>

ity between such agent of the assured and the underwriter. He differs from an ordinary surety: 1 *Duer on Insurance*, ed. 1846, 336, sec. 42; *Emerigon on Insurance*, Meredith's ed. 1850, c. viii, sec. 15 p. 205.

<sup>101</sup> *Baker v. Langhorn*, 6 Taunt, 519; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Morris v. Cleasby*, 4 Maule & S. 566; *Cotton v. Dunham*, 2 Paige Ch. (N. Y.) 267; *Thompson v. Perkins*, 3 Mass. 232; *Bradley v. Richardson*, 23 Vt. 720; *Ex parte White*, L. R. 6 Ch. App. 397, 403. See 2 *Duer on Insurance*, ed. 1846, 310, note a, 311, 331, et seq., 371, note 4; *Russell on Mercantile Agents*, 125.

<sup>102</sup> *Grove v. Dubois*, 1 Term Rep. 112; *Blize v. Dickason*, 1 Term Rep. 285. See *Emerigon on Insurance*, Meredith's ed. 1845, c. viii, *Sherwood v. Stone*, 14 N. Y. 267; *Conterrer v. Hastie*, 8 Ex. 40; *Cartwright v. Greene*, 47 Barb. (N. Y.) 9; *Wolff v. Koppell*, 5 Hill (N. Y.) 458; 2 Denio (N. Y.), 368; *Sherwood v. Stone*, 14 N. Y. 267.

<sup>103</sup> *Wolff v. Keppell*, 5 Hill, 458; 2 Denio (N. Y.), 368; *Wickham v. Wickham*, 2 Kay & J. 478; *Swan v. Nesmuth*, 7 Pick. (Mass.) 220; *Sherwood v. Stone*, 14 N. Y. 267; *Conterrer v. Hastie*, 8 Ex. 40; *Cartwright v. Greene*, 47 Barb. (N. Y.) 9; *Bradley v. Richardson*, 23 Vt. 720; *Lewis v. Brehme*, 33 Md. 412; 3 Am. Rep. 190.

<sup>104</sup> *Carruthers v. Graham*, 14 East, 578.

<sup>105</sup> See *Klister v. Eason*, 2 Maule & S. 112; 2 *Duer on Insurance*, ed. 1846, 337. "When he has paid a total loss to his principal for which no judgment has yet been obtained against the underwriter, he should, for his own safety, take an assignment of the policy, or procure the written consent of the assured that the policy shall be kept alive for his (the agent's) benefit. In other words, he must be careful so to make the payment to his principal as not to extinguish the contract or the subsistence of which his right to an indemnity and the means of enforcing it solely depend": 2 *Duer on Insurance*, ed. 1846, 337, 338.

§ 623. **Insurance by Factors.**<sup>106</sup>—A factor is an agent authorized to sell goods in his possession. They may be consigned or delivered to him by or for his principal. In case of a supercargo, he accompanies the cargo on the voyage. Frequently he is designated as a “consignee” or “commission merchant.”<sup>107</sup> A factor who has his principal’s goods in his possession may insure, but he is not bound to do so. There are, however, exceptions to this rule, as where the custom or usage between the principal and agent implies a duty of the agent to insure. So the insurer may promise to insure, and thus bind himself thereto, or may receive express orders to insure, in which case he is bound to execute the orders, and where an obligation rests upon him to insure, and he is liable for neglect to do so the same as if he himself were the insurer, although in such case he is entitled to credit for the premium.<sup>108</sup>

§ 624. **Supercargo—Power to Insure.**<sup>109</sup>—A supercargo has, as such, no possession of the goods or power over them during the continuance of the voyage. This agency or trust attaches on the arrival of the ship, and is to sell in the foreign market. The goods are consigned to him for this purpose. He is a factor, but has no authority or right to insure except under a special direction.<sup>110</sup> It is held, however, that a super-

<sup>106</sup> See sec. 931, herein.

<sup>107</sup> Ewell's *Evans on Agency*, ed. 1879; 3 *Story on Agency*, sec. 38. “A factor is a person to whom goods are consigned for sale by a merchant residing abroad, or at a distance from the place of sale, and he usually sells in his own name without disclosing that of his principal. The latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name”: *Barring v. Corrie*, 2 *Barn. & Ald.* 143, per *Abbott*, C. J.; *Perkins v. State*, 50 *Ala.* 154; *Graham v. Duckwall*, 8 *Bush (Ky.)*, 12.

<sup>108</sup> *Schaeffer v. Kirk*, 49 *Ill.* 251; *Kingston v. Wilson*, 4 *Wash. (C. C.)* 310, 315; *Ætna Ins. Co. v. Jackson*, 16 *B. Mon. (Ky.)* 242; *Lee v. Adolt*, 37 *N. Y.* 78; *Thorne v. Deas*, 4 *Johns. (N. Y.)* 84; *De Tastet v. Counsillat*, 2 *Wash. (C. C.)* 132, 136; *Crosble v. McDoual*, 13 *Ves.* 148, 158; *Brisban v. Boyd*, 4 *Palge (N. Y.)*, 17; *Schonfield v. Flesher*, 73 *Ill.* 404; *Smith v. Lascelles*, 2 *Term Rep.* 189.

<sup>109</sup> See sec. 931, herein.

<sup>110</sup> *De Forest v. Fulton F. Ins. Co.*, 1 *Hall (N. Y.)*, 84, 114, per *Jones*, C. J. But see discussion as to power to insure in 2 *Duer on Insurance*, ed. 1846, 163, et seq.

cargo may be authorized, under certain circumstances, to insure, as in case the goods are waiting for a market.<sup>111</sup>

**§ 625. Authority of Commission Merchants—Consignees.**<sup>112</sup>—In the absence of usage, no obligation rests upon a consignee to insure, unless there be express or implied orders therefor.<sup>113</sup> A mere naked consignee, with the bare right to take possession, cannot insure, so as to bind the principal, without special instructions. Where he has no instructions, and no interest or property in the subject matter, he becomes, by effecting insurance, a mere voluntary agent, whose contract, to be valid, must be ratified or adopted by the principal. It is intimated that such agent may insure in his own name if he states the interest to be in his principal, but even in such case there must be a ratification of the act. A consignee, unless liable for the price of the goods upon delivery, may not insure them while in transit.<sup>114</sup> It is declared, however, that such agent may insure in his own name if he states the interest to be in

<sup>111</sup> *De Forest v. Fulton Ins. Co.*, 1 Hall (N. Y.), 84, per Jones, J.

<sup>112</sup> See secs. 927, 931, herein.

<sup>113</sup> *Brisban v. Boyd*, 4 Paige (N. Y.), 17; *Shaw v. Aetna Ins. Co.*, 49 Mo. 578; *Randolph v. Ware*, 3 Cranch (U. S.), 503. See 2 Duer on Insurance, ed. 1846, 107.

<sup>114</sup> See *Lucena v. Crawford*, 2 Bos. & P. (N. R.) 307, per Lawrence, J.; *The Josephine*, 4 Rob. 21; *Wolff v. Horncastle*, 1 Bos. & P. 316; *Warder v. Horton*, 4 Binn. 529; *The Atlas*, 3 C. Rob. (Admr.) 299. "On the grounds, therefore, of usage and reason, and the consent of foreign jurists, I state, with little hesitation, that a mere naked consignee not specially instructed cannot bind his principal by an insurance, nor is the contract, unless ratified, valid against the insurers. Where the consignee has no interest and no instructions, he acts at his own peril. He is a mere voluntary agent, whose contract is only valid when adopted by the principal": 2 Duer on Insurance, ed. 1846, 108. And see *Id.* 160, et seq. "A consignee to whom property is consigned to be sold by him merely as factor of the consignor or other party, though he has himself an insurable interest of his own to the amount of his commissions and of his advances, for which he has a lien on the consigned subject, is not merely in his character as such consignee vested with authority to effect insurance on the subject for his principal while it is in transit. Any insurance so made by him without instructions will therefore be a voluntary insurance, and its validity will depend upon its being ratified by the party for whose benefit it is made": 2 Phillips on Insurance,



his principal, and that the principal may thereafter adopt such act.<sup>115</sup> It has also been decided that a consignee, with general powers to manage and sell the property, has an insurable interest in the goods in his possession as consignee, and may insure them in his own name, and aver the interest in himself.<sup>115a</sup> The general rule may be stated thus: A consignee may insure in his own name, and on his own account, for the whole value, and, in case of loss, may recover the whole amount provided for in the policy, even though there be no previous instructions or subsequent ratification, in all cases where he has the principal's goods in his possession, he being responsible therefor, and having a special interest therein to the amount of his commissions; where he is an indorsee of a

3d ed., sec. 1858. "With regard to consignees, who have a mere naked right to take possession without being either intrusted to sell it on commission or having a lien upon it for advances, Lord Eldon says: 'I will not say they may not insure if they state their interest to be in their principal.' . . . But such mere naked consignees have no insurable interest so as to enable them to effect the policy in their own names and on their own account, and to recover upon it averring the interest to be in themselves. They have no legal property in the subject matter of the insurance. They are not beneficially interested in it, and they can, therefore, only effect the insurance on account of those who are so interested and so entitled; and must aver the interest to be in those on whose account the insurance was made": 1 Arnould on Marine Insurance, Perkins' ed., 252, side p. 246. "It is not to be inferred . . . that cases do not occur in which a consignee may rightfully insure in his own name, even before the arrival of the goods consigned to him. His right to do so seems unquestionable when he is in the actual possession as a trustee, and the nature or terms of his trust confer the authority or impose the duty to insure": 2 Duer on Insurance, ed. 1846, 173.

<sup>115</sup> Wolff v. Horncastle, 1 Bos. & P. 316.

<sup>115a</sup> De Forest v. Fulton F. Ins. Co., 1 Hall (N. Y.), 84, 108. See criticism of this case, in 2 Duer on Insurance, ed. 1846, 109, 160, note 2, where it is said that "the insurable interest of a factor or consignee is limited to his advances constituting a lien on the property," citing Carruthers v. Shedden, 6 Taunt. 80; Gordon v. London Assur. Co., 1 Burr. 489; 1 W. Black. 103; Russell v. Union Ins. Co., 4 Dall. (U. S.) 421; Seamans v. Loring, 1 Mason (C. C.), 128. And Phillips (2 Phillips on Insurance, 3d ed., sec. 1859, p. 536), referring to the De Forest decision, says: "This position is not sustained by the jurisprudence on the subject." But see Story on Agency, sec. 111, n. 4.

bill of lading, with a general balance due; where he has power to sell, and has a lien or claim on the goods for advances; where he is a commission agent with possession for the purpose of sale. So the right to insure for the consignor or owner may arise by implication from the fact that he has also an insurable interest.<sup>116</sup> And although a person has no pecuniary interest in property, but merely has it in his possession or custody, nevertheless he has the right to insure it in his own name for the benefit of the owners, and this is true even though no responsibility rests upon him to keep it safely, and the owner may subsequently ratify such act.<sup>117</sup> So insurance by a consignee "on merchandise, his own, or held by him in trust or on commission," covers the interest of the consignee and consignor.<sup>118</sup> And where consignees effected insurance, and in an action thereon averred an interest in the consignor, and in the second

<sup>116</sup> *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242; *Shaw v. Ætna Ins. Co.*, 49 Mo. 578; *Aldrick v. Equitable Safety Ins. Co.*, 1 Wood. & M. (C. C.) 272; *Waring v. Indemnity Ins. Co.*, 45 N. Y. 600; *Randolph v. Ware*, 3 Cranch (U. S.), 508; *Caldwell v. Bell*, 1 Durn. & E. (Term Rep.) 205; *De Forest v. Fulton Ins. Co.*, 1 Hall (N. Y.), 84; *Lagrange v. Union etc. Ins. Co.*, L. R. 1 C. P. D. 305; *Home Ins. Co. v. Baltimore Warehouse Co.*, 3 Otto (U. S.), 527; *Lee v. Adsit*, 37 N. Y. 86; *Parls v. Gen. Int. Ins. Co.*, 5 Pick. (Mass.) 84; *Godin v. London Assur. Corp.*, 1 Burr. 489; 1 W. Black. 103; *Law v. Goddard*, 12 Mass. 112; *Seter v. Motts*, 13 Pa. St. 218; *Williams v. Crescent etc. Ins. Co.*, 15 La. Ann. 651; *Stillwell v. Staples*, 19 N. Y. 401; *Russell v. Union Ins. Co.*, 1 Wash. (C. C.) 409; *Robertson v. Hamilton*, 14 East, 522; *Shaw v. Ætna Ins. Co.*, 49 Mo. 578; *Morris v. Summerl.*, 2 Wash. C. C. (U. S.) 203; *M'Andrew v. Bell*, 1 Esp. 373; *Johnson v. Campbell*, 120 Mass. 449; *Waters v. Monarch Ins. Co.*, 5 El. & B. 870; *Buck v. Chesapeake Ins. Co.*, 1 Pet. (U. S.) 151. Criticised in 2 Duer on Insurance, ed. 1846, 173, as not supported by the authorities: *Barker v. Marine Ins. Co.*, 2 Mason (C. C.), 309; 1 Arnould on Marine Insurance, Perkins' ed., 252, side p. 246, et seq.; 1 Wood on Fire Insurance, 2d ed., 662-65. He may effect an insurance in his own name on account of whom it may concern, loss payable to him, and in case of loss may sue therein: *Sturm v. Atlantic Mut. Ins. Co.*, 63 N. Y. 77. But see *London etc. Ry. Co. v. Glynn*, 1 El. & E. 652.

<sup>117</sup> *Herkimer v. Rice*, 27 N. Y. 163; *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606; 6 Am. Rep. 146; *Dourand v. Thourand*, Port. (Ala.) 238; *Lee v. Adsit*, 37 N. Y. 86.

<sup>118</sup> *Johnson v. Campbell*, 120 Mass. 449; *Waring v. Indemnity Ins. Co.*, 45 N. Y. 606; 6 Am. Rep. 146.

count, in themselves for advances, the whole value of the cargo was recovered.<sup>119</sup> But a consignee to insure cannot take the risk himself, and recover the premium from his principal.<sup>120</sup> Where commission merchants invite consignments of goods, under a statement that they will be covered by insurance, such promise is carried out if they obtain the requisite insurance, and it does not imply that they personally will become insurers.<sup>121</sup> So an obligation to insure may be imposed upon a consignee by a general custom or as agent, and his neglect to insure will in such case render him liable;<sup>122</sup> and if he has been accustomed to insure goods consigned to him with orders to insure, the owner has a right to rely upon the belief that such course of dealing has been complied with.<sup>123</sup> When a consignee accepts a consignment with instructions from his principal to insure for his benefit, it becomes his duty to insure. If he neglects to do so, and a loss occurs, he is liable, and he may, in such case, insure to the full value of the goods consigned. If, in such case, the insurance is made in the name of the consignee, the policy inures to the benefit of the principal, and the consignee, as trustee, may recover the insurance.<sup>124</sup> In such case the consignee need not insure in his name, nor need he place the policy in the consignor's

<sup>119</sup> *Wolff v. Horncastle*, 1 Bos. & P. 316.

<sup>120</sup> *Keane v. Branden*, 12 La. Ann. 20.

<sup>121</sup> *Johnson v. Campbell*, 120 Mass. 449.

<sup>122</sup> *Kingston v. Wilson*, 4 Wash. (C. C.) 310, 315; *Brisban v. Boyd*, 4 Paige Ch. (N. Y.) 17, per Walworth, J. See *French v. Reed*, 6 Binn. (Pa.) 308; *De Forest v. Fulkon Ins. Co.*, 1 Hall (N. Y.), 84. See criticism on this, 2 *Duer on Insurance*, ed. 1846, 160, note 2.

<sup>123</sup> *Smith v. Lascelles*, 2 Term Rep. 187.

<sup>124</sup> *Shaw v. Aetna Ins. Co.*, 49 Mo. 578; 8 Am. Rep. 150, and note. In this case there was an action on a policy of insurance; the petition alleged that the plaintiffs, being the owners of a quantity of ice, consigned it to S. and K., to be sold by them on commission; that plaintiffs ordered the consignees to have the ice insured, which they agreed to do, but instead of insuring it in the names of plaintiffs, they made the insurance in their own names; that a portion of the ice was lost by a peril provided against, and the consignees assigned the policy to plaintiffs. Defendants demurred, on the ground that the consignees had no insurable interest in the ice, and the demurrer was sustained. This was held to be error.

custody.<sup>125</sup> Although usage may impose upon the consignee a duty to insure, yet if he notifies the shipper that he will not insure without express orders, he is not bound to insure,<sup>126</sup> for a general custom for the consignee to insure is for his benefit and security, and may be waived by him.<sup>127</sup> And if directions to insure be given to one to whom it would naturally be made in the course of trade, he must obey the direction, or give notice of his dissent, otherwise he will be liable for his neglect to insure, since the owner should be given an opportunity to apply elsewhere.<sup>128</sup> But if the insurance directed to be effected would have been void, the agent is not responsible for failure to comply with orders.<sup>129</sup> The reason that a correspondent who receives a bill of lading with directions to insure is bound, by accepting the same, to obey the order is, that if he accepts, he must take it according to the terms of the consignment. If he refuses to accept, he should promptly give notice thereof.<sup>130</sup> If he omits to insure to the full value as instructed, he is liable<sup>131</sup> or if he fails to follow instructions and no insurance is effected, he is liable.<sup>132</sup> If a consignee who receives a bill of lading with directions to insure, and transfers the bill and order to another, who effects the insurance, and, on arrival of the goods received, sells them and becomes insolvent, the consignee is liable for the value of the goods, since the confidence reposed in an agent is personal, and his authority cannot be delegated.<sup>133</sup> But the evidence must be conclusive to warrant a recovery against a consignee for

<sup>125</sup> *Johnson v. Campbell*, 120 Mass. 440.

<sup>126</sup> *Randolph v. Ware*, 3 Cranch (U. S.), 503.

<sup>127</sup> *Kingston v. Willson*, 4 Wash. (C. C.) 310, 315.

<sup>128</sup> *Smith v. Lascelles*, 2 Term Rep. 187, per Ashurst, J.

<sup>129</sup> *Alsop v. Coit*, 12 Mass. 40.

<sup>130</sup> *De Tastet v. Counsillat*, 2 Wash. (C. C.) 136; *Wolff v. Horncastle*, 1 Bos. & P. 316; *Corlett v. Jordan*, 3 Camp. 472; *Smith v. Lascelles*, 2 Term Rep. 187; *Elee v. French*, 11 N. H. 356; 1 *Arnould on Marine Insurance*, Perkins' ed., 153, side p. 152; 2 *Duer on Insurance*, ed. 1846, 131, sec. 19.

<sup>131</sup> *Elee v. French*, 11 N. H. 356.

<sup>132</sup> *Stour v. Eaton*, 50 Me. 219.

<sup>133</sup> *Corlett v. Gordon*, 3 Camp. 472. See opinion per Lord Ellenborough.

neglect of his duty to insure.<sup>134</sup> After an abandonment, the consignee of the goods insured becomes the agent of the insurer, and his acts, if done in good faith, are at the risk and for the benefit of the insurer.<sup>135</sup>

**§ 626. Bailee may Effect Insurance—Warehouseman.**

Where a warehouse company have the actual and physical possession of goods, and a railroad company have only taken constructive possession of the property, by acquiring receipts of the bailee, and issuing bills of lading therefor, the warehouse company may effect insurance, as bailee or agent, for the railroad company's protection, or may insure for its own benefit.<sup>136</sup>

**§ 627. Authority of Trustees.**<sup>137</sup>—One who holds goods in trust may insure them in his own name, and, in case of a loss, may recover the whole amount due under the policy. The excess over his own insurable interest will be held by him, as trustee, for the benefit of those by whom the goods were intrusted to his care.<sup>138</sup> If a party insures goods as his property, or as held in trust, and the owner does not ratify the insurance till after loss is paid, the owner cannot recover from such trustee a proportionate part of such sum, it not being sufficient to cover the loss of the insured.<sup>139</sup> If a trustee has full power under the deed to select the company, due care is required in the exercise of his discretion, but he does not become a guarantor of their solvency,<sup>140</sup> and an executor who procures a life policy to secure a debt to the estate, and thereafter suffers it to lapse, becomes a trustee thereof for the benefit of the estate, and is liable for the

<sup>134</sup> *Tonge v. Kennett*, 10 La. Ann. 800.

<sup>135</sup> *Gardiner v. Smith*, 1 Johns. Cas. (N. Y.) 141.

<sup>136</sup> *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387; 10 Sup. Ct. Rep. 365. See sec. 926, herein.

<sup>137</sup> See sec. 932, herein.

<sup>138</sup> *Insurance Co. v. Chase*, 5 Wall. (U. S.) 509; *Pratt v. Phoenix Ins. Co.*, 1 Browne (Pa.), 267; *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387; 10 Sup. Ct. Rep. 365.

<sup>139</sup> *Stillwell v. Staples*, 19 N. Y. 401.

<sup>140</sup> *Gettings v. Scudder*, 71 Ill. 86.

amount insured, less the premiums paid by him.<sup>141</sup> So trustees holding the legal title, or having the disposal of ships and goods in accordance with instructions which they may receive from another, may insure the same for the use of the beneficiary.<sup>142</sup> Thus, a trustee holding the legal title to a vessel may insure her for the use of the beneficiary,<sup>143</sup> and one of several cotrustees may insure for the whole for the benefit of the cestui que trust; nor is it necessary in such case to incorporate the character of the interest in the policy, unless the insurers would have been so influenced thereby as not to have underwritten at all, or except at a higher premium than that charged.<sup>144</sup> So where the property was vested in a testamentary trustee, in trust for the heirs of the former owner, and such trustee, being authorized by the will to do so, insured the property for the benefit of the heirs and representatives of the testator, it was decided that the trustee, although not named in the policy, could enforce it for the beneficiaries under the will.<sup>145</sup> And, in general, money received by the trustee under the policy is a trust in his hands for the beneficiary, subject to such lien as he may have for premiums paid out of funds of his own.<sup>146</sup> So where the trustees of an asylum, in pursuance of an act of the legislature, conveyed such asylum to the people, and a fire policy was issued in the name of the people, it was held that they had a right to insure in their own name for the benefit of the owners, and to bring an action, as trustees, for a loss under the policy.<sup>147</sup>

**§ 628. Treasurer of Local Lodge may be Trustee.—** Money paid upon assessments to treasurers of local societies by members thereof is held by them as trustees of the society,

<sup>141</sup> *Garner v. Moore*, 24 L. J. Ch. 687; 3 Drew. 277.

<sup>142</sup> *Savage v. Howard Ins. Co.*, 52 N. Y. 502; 1 *Marshall on Marine Insurance*, ed. 1810, \*109; *Crauford v. Hunter*, 8 Term. Rep. 13; *Hughes v. Mercantile Ins. Co.*, 55 N. Y. 285; 44 How. Pr. (N. Y.) 361. See sec. 514, herein.

<sup>143</sup> *Young v. Union Ins. Co.*, 24 Fed. Rep. 279.

<sup>144</sup> *Insurance Co. v. Chase*, 5 Wall. (U. S.) 500.

<sup>145</sup> *Savage v. Howard Ins. Co.*, 52 N. Y. 502; 11 Am. Rep. 741.

<sup>146</sup> *Ex parte Andrews*, 1 Madd. 573; *Holland v. Smith*, 6 Esp. 11.

<sup>147</sup> *People v. Liverpool etc. Ins. Co.*, 2 Thomp. & C. (N. Y.) 268.

and may be garnished as its property, where such agents are, by force of the constitution and by-laws of the association, authorized to receipt for all payments so made by members of the local branches, to make a monthly report, and to remit said moneys to the society, and are under bonds therefor.<sup>148</sup>

§ 629. **Authority of Prize Agents to Insure.**—By the English decisions, a prize agent who has power to act, in his discretion, on behalf of all interested persons may insure for his principal. Thus, commissioners authorized by statute to take into their care certain ships in certain ports, and dispose thereof according to directions from the privy council, may insure such ships in their own names after seizure at sea. In a certain sense, the prize agent is a trustee, having the disposal of ships and goods; the insurance need not be made by the party in his own right, but as trustee for those persons who should be eventually entitled to it.<sup>149</sup> But in this country there must be an actual grant from the government, to warrant any insurable interest whatever in prizes.<sup>150</sup>

§ 630. **Agent—Insurance by Carrier.**<sup>151</sup>—The owner has an interest in an insurance made by a carrier for his benefit upon goods in his possession, where it is not limited to the latter's liability or interest, such an insurance being made for the

<sup>148</sup> *Jepson v. International Fraternal Alliance*, 17 R. I. 471; 23 Atl. Rep. 15.

<sup>149</sup> See *Cranford v. Hunter*, 8 Term. Rep. 13. As to the last statement, see opinion of Mr. Justice Ashurst; *Lucuna v. Cranford*, 2 Bes. & P. (N. R.) 269; 3 Bos. & P. 75; *Stirling v. Vaughan*, 11 East, 619; *Robertson v. Hamilton*, 14 East, 522; *Routh v. Thompson*, 13 East, 274. These cases are exhaustively considered in 1 Arnould on Marine Insurance, Perkins' ed., 268-79, art. 8, sec. 114; 1 Marshall on Insurance, ed. 1810, side p. 108, et seq. See 1 Phillips on Insurance, 3d ed. p. 182, 183, secs. 320-24.

<sup>150</sup> *The Joseph*, 1 Gall. (C. C.), per Story, J. It was considered in the celebrated case of *Cranford v. Hunter*, 8 Term. Rep. 13, per Lord Kenyon, that at common law an insurance might have been made without interest, although in that case commissioners were authorized by statute to take possession, and the plaintiffs were therefore said to be in the nature of agencies.

<sup>151</sup> See secs. 898, 925, herein.

whole value.<sup>152</sup> In a case in the United States circuit court,<sup>153</sup> a railroad company, which had contracted with the plaintiff to carry a cargo of rails to a certain point, and to forward from there by water to Duluth, agreed, through its agent, with defendant that the latter should insure, and forward the cargo between said points. The defendant received the cargo, and, having procured certificates for an insurance, the policy to be issued, deposited them with the railroad's agent. It was held that the plaintiff was estopped to object, either to the amount of insurance or to the form of the policies, by the act of said agent in receiving and retaining said certificates, although the defendant did not deal directly with the plaintiff.

**§ 631. Where Husband Acts as Agent of Wife.**—Although a husband acts as agent for his wife in procuring a policy of life insurance, he is not thereby vested with authority to surrender it without her consent, nor does a ratification of such act arise from the fact that she was informed thereof when done, but did not dissent nor notify the company until a month after the death of the insured, where his health was such as to necessitate her constant care and attention.<sup>154</sup> So where he surrenders the policy without her consent, and a failure to pay the premiums arises from the company's neglect to send notices when they are due, in consequence of such surrender, a forfeiture is not necessarily incurred thereby.<sup>155</sup>

**§ 632. Insured's Agent.—Adjustment of Loss.**—An agent may undoubtedly be expressly authorized by the assured to adjust a loss. An agent to insure may be authorized to collect

<sup>152</sup> *Lancaster Mills v. Merchants' Cotton Press etc. Co.*, 89 Tenn. 115; 14 S. W. Rep. 317. See *Savage v. Com. Exch. etc. Ins. Co.*, 36 N. Y. 655; *Herkimer v. Rice*, 27 N. Y. 163; *Mittenberger v. Beacon*, 9 Pa. St. 198, as to the right of a person having the mere custody of property to insure.

<sup>153</sup> *Scranton Steel Co. v. Ward's etc. Line*, 40 Fed. Rep. 886.

<sup>154</sup> *Stillwell v. Mutual L. Ins. Co.*, 72 N. Y. 385.

<sup>155</sup> *Whitehead v. New York L. Ins. Co.*, 102 N. Y. 143; 55 Am. Rep. 787; reversing 33 Hun (N. Y.), 425, under N. Y. Laws 1840, c. 80, making the husband the agent of the wife and children where he insures his life for their benefit. See sec. 633, as to proofs of loss executed by husband for wife.



a loss where he retains the policy. If such agent corresponds with his principal in relation to the matter of collecting the money, and does collect it, the presumption exists that he does retain the policy, and his principal will, in such case, be liable to another for whom he himself acted for the money so collected.<sup>156</sup> In England, an authority to effect an insurance implies an authority to adjust a loss or to agree therefor.<sup>157</sup> But in that country, however, the policy is, in the usual course of business, generally left in the hands of the agent or broker to have it adjusted, and in such case he is presumed to obtain a speedy adjustment and settlement from the underwriter, and to use all reasonable diligence to that end.<sup>158</sup> To the extent then that an agent or broker to effect an insurance may be authorized by usage or by retaining possession of the policy to adjust and settle a loss, the English cases will be an authority supporting the affirmative of such a proposition.<sup>159</sup> But an authority to adjust a particular loss does not warrant an adjustment of a different one.<sup>160</sup>

**§ 633. Authority of Insured's Agent as to Proofs of Loss.**—In fire policies an agent may, in certain cases, make proofs of loss.<sup>160a</sup> So where a person effects a policy for his principal, receives the same, pays the premium, and is in every manner recognized by the company as such agent, it cannot question his authority, in case of loss by fire, to make preliminary proofs.<sup>161</sup> And a third person may sign proofs of

<sup>156</sup> *De Ro v. Cordes*, 4 Cal. 117; *Erick v. Johnson*, 6 Mass. 193. See sec. 611.

<sup>157</sup> *Richardson v. Anderson*, 1 Camp. 43, n. 65, n.

<sup>158</sup> *Bonsfield v. Cressfield*, 2 Camp. 544. As to the mode of adjustment of a policy and settling a loss in England, see 1 *Arnould on Marine Insurance*, Perkins' ed., 110, et seq., 126, art. 3, et seq.

<sup>159</sup> See *Rindle v. Moore*, 3 Johns. Cas. (N. Y.) 36.

<sup>160</sup> *Hartford F. Ins. Co. v. Smith*, 3 Colo. 422.

<sup>160a</sup> *O'Connor v. Hartford F. Ins. Co.*, 31 Wis. 160; *Farmers' Mut. Ins. Co. v. Graybill*, 74 Pa. St. 17; *Frost v. Saratoga Ins. Co.*, 5 Denio (N. Y.), 54; *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505; *McGraw v. Germania Ins. Co.*, 54 Miss. 145; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176; *Graham v. Phoenix Ins. Co.*, 17 Hun (N. Y.), 156; *German F. Ins. Co. v. Grunert*, 112 Ill. 68.

<sup>161</sup> *Swan v. Liverpool etc. Ins. Co.*, 52 Miss. 704.

loss at the request of the assured, and such signing is sufficient.<sup>162</sup> And if the agent executes the premium note, corresponds with the company, and conducts the entire business for the assured, who does not appear in the transactions or know anything of the policies, he may swear to the certificate of loss, although the policy requires that it shall be sworn to by the assured.<sup>163</sup> Upon this point, the court said: "The policy was obtained by the agent, the application was made and signed by him, and the premium note was executed by him; he had other policies in the same company, obtained also as agent. In his whole correspondence with the company at their home office, and in his interviews with their agents, he acted as agent for the insured, and it does not appear that the latter was known to the officers of the company, or knew anything about the policies, or whether he had any. Under these circumstances, if the proof is not to be made by the agent, it cannot be made at all, and the position assumed by counsel places the officers of the company in the attitude of issuing policies and receiving premiums, knowing from the nature of the case that no legal proof could be made of the loss, if it should occur. We will not place them in that position, but, on the other hand, hold that proof and certificate made by the man with whom they had all their dealings, who was in sole possession of the property insured, and who alone knew the facts necessary to be embodied in the paper—who in fact was, as it were, insured as agent—is a compliance with this requirement of the policy."<sup>164</sup> A husband may execute proof of loss where he conducts the whole transaction relating to the insurance as agent for his wife, whose property was insured, and she has no personal knowledge concerning the property.<sup>165</sup>

**§ 634. Authority of Agent to Make Abandonment—Master.**—If the assured's agent has the authority to effect the insurance, or if he has effected it and has possession of the

<sup>162</sup> *Stimpson v. Monmouth Mut. F. Ins. Co.*, 47 Me. 349.

<sup>163</sup> *Sims v. State etc. Ins. Co.*, 47 Mo. 54; 4 Am. Rep. 311.

<sup>164</sup> *Sims v. State Ins. Co.*, 47 Mo. 54; 4 Am. Rep. 312, per Bliss, J.

<sup>165</sup> *Finderson v. Metropole Ins. Co.*, 57 Vt. 520.

policy, or if the loss is payable to assured under a policy "on account of whom it may concern," or if one is a part owner, it is held that he has authority to abandon and make demand for a total loss, even without a formal power of attorney; and if he has a formal power of attorney he may abandon.<sup>166</sup> So if the agent is empowered to exercise discretion as to abandonment, he may abandon or not if he acts in good faith.<sup>167</sup> It is said by Mr. Phillips that the agent's authority to abandon should not rest upon doubtful evidence, since a transfer of title is involved, and the underwriters should be bound if they accept, or if the insured insists upon it.<sup>168</sup> Mr. Duer, however, is of opinion that where a claim of total loss, dependent upon abandonment, is relied upon, the agent whose authority still continues, as where the policy is retained for that purpose with the consent of the principal, must abandon on behalf of his principal and must take care that it is properly expressed and delivered in due season.<sup>169</sup> As we have seen in a preceding section, the possession of the policy creates an agency under certain circumstances.<sup>170</sup> So also the cases noted under the last section,<sup>171</sup> as to the right of an agent to make proofs of loss, sustain some analogy, although they are not perhaps direct authority. The true rule would seem to be this, that special reference must be had to the character of the agency, and the dealings, practice, and relative situation of the parties and the terms of the contract, and if from all the circumstances it may reasonably be assumed that the agent has

<sup>166</sup> *Chesapeake Ins. Co. v. Stark*, 6 Cranch (U. S.), 268, per Marshall, C. J.; *Cassedy v. Louisiana State Ins. Co.*, 18 Mart. (La.) 421; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191; *Parker v. Towers*, 2 Browne App. 80; *Hunt v. Royal Exch. Ins. Co.*, 5 Maule & S. 47; *Lattonius v. Farmers' M. F. Ins. Co.*, 3 Houst. (Del.) 404; *Briggs v. Call*, 5 Met. 504. See Emerigon on Insurance, Meredith's ed. 1850, 112, c. v, sec. 4, where it is said that an agent insuring on account of others may abandon. *Examine Hurlin v. Phoenix Ins. Co.*, 1 Wash. (C. C.) 400. As to authority of mortgagor to abandon, see sec. 2902, herein, "Abandonment by . . . mortgagor," etc.

<sup>167</sup> *Comber v. Anderson*, 2 Camp. 545.

<sup>168</sup> 2 Phillips on Insurance, 3d ed., p. 544, sec. 1881.

<sup>169</sup> 2 Duer on Marine Insurance, ed. 1846, 245, sec. 42.

<sup>170</sup> Sec. 611, herein.

<sup>171</sup> Sec. 633, herein.

authority to abandon, it should be held to exist. But the insurer should not, especially where assured is at a distance, be permitted to reject the claimed authority without such reasonable notice as will enable the required evidence of authority to be produced in time.<sup>172</sup> The right to abandon cannot be destroyed on the ground that the master acted as agent for the assured, while it was doubtful whether or not he would abandon.<sup>173</sup> And it is held that if the protest and offer to abandon, made by the master's direction, had been communicated to the insurers directly by the master without authority shown on his part to abandon, it would have been invalid.<sup>174</sup>

**§ 635. Broker not Agent of Insurer to Receive Notice of Transfer of Policy.**—If the evidence shows affirmatively that a broker is not the agent of an insurance company, and does not assume to act as such, he will not be held an agent of the company to receive notice and accord assent to a transfer or assignment of a policy.<sup>175</sup>

**§ 636. Agent or Broker Procuring Insurance Cannot Cancel.**—Although there are decisions otherwise, yet the authority of an agent or broker, specially employed to procure insurance for his principal, terminates with the procurement of the policy. It cannot, in reason, be held to continue after the purpose for which the agency was created has been accomplished, and the policy delivered to the principal. An agent to make a contract has no power to discharge it, implied from the original authority alone. If he possesses that power, it must arise from some actual or apparent authority superadded to that arising from the mere fact of a special employment to procure a policy. These principles are well settled.<sup>176</sup>

<sup>172</sup> See as to the last of these points, 2 Phillips on Insurance, 3d ed., p. 544, sec. 1881.

<sup>173</sup> Dickey v. American Ins. Co., 3 Wend. (N. Y.) 658; 20 Am. Dec. 763.

<sup>174</sup> Patapsco Ins. Co. v. Southgate, 5 Pet. (U. S.) 604.

<sup>175</sup> Richmond v. Phoenix Assur. Co., 88 Me. 105. See Rev. Stat. Me., c. 49, secs. 19, 90.

<sup>176</sup> Mutual Assur. Soc. v. Scottish etc. Ins. Co., 84 Va. 116; 4 S. E. Rep. 178; Hermann v. Insurance Co., 100 N. Y. 411, per Andrew, J.;

The fact that a policy is assigned as security for a debt does not authorize its cancellation and substitution of another policy, even though done at the request of the agent of the assured. The latter's consent is necessary in such case, unless he has notice or knowledge thereof.<sup>177</sup> There are cases, however, in which such agent may be authorized to rescind, which will be noted hereafter.

**§ 637. Notice of Cancellation to Agent or Broker Procuring Insurance Insufficient.**—The insured does not, by specially employing an agent or broker to effect a policy, make him his agent to receive notice of cancellation and return of the premium, and a notice of cancellation given to such agent or broker is ineffectual to accomplish that result. This rule is based upon the same reasons as are given under the last section.<sup>178</sup> And sending the unearned premium to the agent or broker who effected the policy is not sufficient to effect a cancellation.<sup>179</sup> Nor is the policy canceled by returning to such broker part of the unearned premium in cash, and crediting him with a premium equal to the balance thereof on a

*Franklin Ins. Co. v. Cars*, 21 Fed. Rep. 229; *Latoix v. Germania Ins. Co.*, 27 La. Ann. 113; *Rothschild v. American Cent. Ins. Co.*, 5 Mo. App. 596; 74 Mo. 41; 41 Am. Rep. 303; *Insurance Co. v. Forchheimer (Ala.)*, 5 S. Rep. 870; *Quong Tue Sing v. Anglo-Nevada Assur. Corp.*, 36 Cal. 566; 25 Pac. Rep. 50; 10 L. R. Annot. 144; *Broadwater v. Lion F. Ins. Co.*, 34 Minn. 465; 26 N. W. Rep. 455; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278; 3 Sup. Ct. Rep. 207; *Von Wein v. Scottish etc. Ins. Co.*, 52 N. Y. Sup. Ct. 490; *Insurance Co. v. Raden*, 87 Ala. 311; *Adams v. Manufacturers' etc. F. Ins. Co.*, 17 Fed. Rep. 630; *Insurance Co. v. Hartwell*, 100 Ind. 566; *Stillwell v. Mutual L. Ins. Co.*, 72 N. Y. 385; *Young v. Newark F. Ins. Co.*, 59 Conn. 41; *Xenos v. Wickham*, 2 L. R. Eng. & Ir. App. 296; 14 Com. B., N. S., 861; *White v. Insurance Co.*, 120 Mass. 330.

<sup>177</sup> *Van Loan v. Farmers' Mut. F. Ins. Co.*, 90 N. Y. 280. See *McLean v. Republic Ins. Co.*, 3 Lans. (N. Y.) 421.

<sup>178</sup> *Von Wein v. Scottish Union etc. Ins. Co.*, 52 N. Y. Sup. Ct. 490; 118 N. Y. 94; *Kehler v. New Orleans Ins. Co.*, 23 Fed. Rep. 709; *Body v. Hartford F. Ins. Co.*, 53 Wis. 157; *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411; *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290; *Insurance Co. v. Hartwell*, 100 Ind. 566; *Van Valkenburgh v. Lennox F. Ins. Co.*, 51 N. Y. 465; *Broadwater v. Lion F. Ins. Co.*, 34 Minn. 466; *Bennett v. City Ins. Co.*, 115 Mass. 241. See secs. 387-91.

<sup>179</sup> *Van Valkenburgh v. Lennox F. Ins. Co.*, 51 N. Y. 465.

new policy in another company.<sup>180</sup> So an agent of insured procuring insurance is not authorized to accept notice of cancellation.<sup>181</sup>

**§ 638. Cancellation—Condition that Notice be Given Party Procuring Insurance.**—The rules given in the last two sections apply, even though the policy provides that the risk may be terminated by giving notice "to the person who may have procured this insurance to be taken,"<sup>182</sup> or where there is a condition that any person procuring the policy shall be deemed the agent of the assured in any transaction relating to the insurance.<sup>183</sup> It is held that a provision like the former does not apply to a person procuring the insurance, where he is the agent of the company which issues the policy, for such a construction of the clause would be against public policy.<sup>184</sup> If the provision that the person who procures the policy shall be deemed the agent of the assured, and not of the company has any force whatever, its obvious meaning is that the person procuring the insurance shall, in respect to that matter, be deemed the agent of the insured.<sup>185</sup> It has been held, however, that if such a condition, or a like one, exists in the policy, a notice of cancellation to the agent or broker who effected the policy is sufficient.<sup>186</sup> In *Lipman v. Niagara Fire Insurance Company*<sup>187</sup> the condition in the policy was, that the insurance could be determined at any time by the com-

<sup>180</sup> *Quong Tue Sing v. Anglo-Nevada Assur. Corp.*, 86 Cal. 566; 25 Pac. Rep. 58.

<sup>181</sup> *British American Assur. Co. v. Cooper* (Colo. 1895), 40 Pac. Rep. 147; 25 Alb. L. J. (N. S., vol. 5) 437.

<sup>182</sup> *Niagara F. Ins. Co. v. Raden* (Ala.), 5 S. Rep. 876.

<sup>183</sup> *Mutual Assur. Soc. v. Scottish Union & Nat. Ins. Co.*, 84 Va. 116; 4 S. E. Rep. 178; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278. But see same case, 16 Blatchf. (U. S.) 433.

<sup>184</sup> *Niagara F. Ins. Co. v. Raden*, 87 Ala. 311; 5 S. Rep. 876.

<sup>185</sup> *Hermann v. Insurance Co.*, 100 N. Y. 411, per Andrew, J.; *Mutual Assur. Soc. v. Scottish U. & N. Ins. Co.*, 84 Va. 116; 12 Va. L. J. 391; 17 Ins. L. J. 570, per the court; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278.

<sup>186</sup> *Newark F. Ins. Co. v. Sammons*, 11 Ill. App. 230; *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85.

<sup>187</sup> 121 N. Y. 454. See *Karelsen v. Sun F. Office*, 122 N. Y. 545; 34 N. Y. St. Rep. 135; *De Grove v. Metropolitan Ins. Co.*, 61 N. Y. 504.

pany, "on giving notice to that effect to the assured, or to the person who may have procured this insurance to be taken by this company." The action in that case was upon an agreement to insure, evidenced by a binding slip. It was held that notice of cancellation given to the brokers procuring the insurance was sufficient. The decision was based upon the rule of law, that in such cases the conditions in the policies in ordinary use in like risks governed the contract. That the court intended to establish by this decision a general rule, which would apply in cases where similar provisions in policies exist, does not satisfactorily appear. It refers to an earlier case in that state,<sup>188</sup> and says: "The special language of the condition in the defendant's policy upon this point was, it is said, inserted to meet the objection pointed out by this court" therein. In addition to this, the court notices the fact that the agency for the insured existed at the time of notice. It says: "The brokers procured the insurance. In fact, their duties in respect to it had not terminated. The binding slip provided that the policy, when issued, should be delivered at their office."

**§ 639. Cancellation—When Notice to Insured's Agent is Sufficient.**—A notice of cancellation must, in order to be effective, be given to an agent authorized to receive the same for the assured.<sup>189</sup> The question whether an authority of an agent to effect an insurance is extended, so as to warrant a cancellation by notice to him thereof, depends largely upon the circumstances of the case. It is a question of fact.<sup>190</sup> It is also said that such question depends on the fact, and not necessarily on the stipulations in the policy.<sup>191</sup> Such notice may be given to a general agent of the assured. Thus, if a broker has been accustomed to act as general agent in regard to matters of insurance for another, and is vested with discre-

<sup>188</sup> *Hermann v. Insurance Co.*, 100 N. Y. 411.

<sup>189</sup> See *Lancashire Ins. Co. v. Nill*, 114 Pa. St. 248; *Mutual Assur. Soc. v. Scottish etc. Ins. Co.*, 84 Va. 116; 4 S. E. Rep. 178. An agent may accept notice of cancellation for his principal where he has entire charge of the property: *Bulck v. Mechanics' Ins. Co.*, 103 Mich. 75; 61 N. W. Rep. 337; 24 Ins. L. J. 375.

<sup>190</sup> *Bennett v. City Ins. Co.*, 115 Mass. 241.

<sup>191</sup> *Indiana Ins. Co. v. Hartwell*, 100 Ind. 566.

tionary powers in relation thereto, and the company charges the broker with the premium, and the policy remains in its hands, notice of cancellation to such broker is sufficient;<sup>192</sup> although, as a general rule, a notice to the insured's agent will not be effectual where the unearned premium is not returned.<sup>193</sup> In another case, an agent had several times acted for the insured in canceling a policy, taking out a new one each time, and, after receiving notice to cancel, did so and accepted the unearned premium. It was held that there was evidence for the jury of an authority to cancel, although the agent neglected to obtain further insurance.<sup>194</sup> So if an agent has the policy in his possession, it may be inferred that he has authority to receive notice, even though he be only an agent to procure insurance.<sup>195</sup> So a partnership may be concluded by a cancellation of a policy upon its property where one of its members consents thereto.<sup>196</sup> But if no general authority to act for the assured be shown, or if there be no known and uniform usage, and there is no evidence of any other than a special employment to effect a policy, then no authority exists to cancel or receive notice of cancellation for the assured.<sup>197</sup> Although, if the assured knows that the company's agent has received notice to cancel, he is bound, from the time he obtains the knowledge, if a right exists in the company to terminate by notice.<sup>198</sup> Again, where a policy, effected by a broker, provided that the insurer could increase the rate of premium at his option, and the company gave notice to the broker of such increase and the latter's clerk returned the policy with directions to cancel, which was done, it was held that no action would lie upon the policy.<sup>199</sup> While an agent's or broker's acts

<sup>192</sup> *Stone v. Franklin Ins. Co. (N. Y.)*, 12 N. E. Rep. 45.

<sup>193</sup> *Van Valkenburgh v. Lennox F. Ins. Co.*, 51 N. Y. 465.

<sup>194</sup> *McCartney v. State Ins. Co.*, 33 Mo. App. 652.

<sup>195</sup> *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 83. See *Lipman v. Niagara F. Ins. Co.*, 121 N. Y. 454; *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502.

<sup>196</sup> *Hillock v. Traders' Ins. Co.*, 54 Mich. 532.

<sup>197</sup> *Adams v. Manufacturers' etc. F. Ins. Co.*, 17 Fed. Rep. 630; *Bennett v. City Ins. Co.*, 115 Mass. 241.

<sup>198</sup> *Springfield F. & M. Ins. Co. v. McKinnon*, 59 Tex. 507.

<sup>199</sup> *Standard Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85; 6 N. Y. S.



in canceling the policy or in receiving the unearned premium with notice of cancellation may undoubtedly be ratified by the insured, there is no ratification where the insured refuses to receive cash from the broker, who has accepted the same as part of the unearned premium, although he does receive a substituted policy, the premium on which was paid by a credit of the balance thereof; it appearing that the new policy was only accepted on the broker's erroneous statement that the original policy was void, and that the broker was instructed to cancel the new policy and obtain another in its place as soon as possible.<sup>200</sup> An agent may not keep a policy in force for his own benefit where instructed to cancel, and whatever advantage may result to him in such case inures to the principal.<sup>201</sup>

**§ 640. Cancellation—Agent of both Parties.**—This question as to agents of both parties is to be distinguished from that where the policy provides that the person procuring the insurance is the agent of the insured, and not of the company, in all transactions relating to the insurance. In the cases wherein the point here considered has been raised and determined, the fact was assumed to exist that the agent did act for both parties, assured and assurer. Thus, the question was directly raised in a Michigan case,<sup>202</sup> where it was held that an agent so acting might be authorized as well to receive as to give notice of cancellation. It appeared that an agent of the company agreed with the policy holder to keep his property insured, gave a personal credit to him, and arranged the premium out of his own money or credits with the company and he retained possession of the policy, and it was declared that his knowledge of the cancellation and the return or credit to him of the premium by the com-

C. 300; 6 Thomp. & C. (N. Y.) 300; 3 Hun (N. Y.), 391. See *Xenos v. Wickham*, 2 L. R. Eng. & Ir. App. 296; 14 Com. B., N. S., 861.

<sup>200</sup> *Quong Tue Sing v. Anglo-Nevada Assur. Corp.*, 86 Cal. 566; 25 Pac. Rep. 58; 10 L. R. Annot. 144. See secs. 641, 642, herein.

<sup>201</sup> *Dutton v. Willner*, 52 N. Y. 312.

<sup>202</sup> *Hartford Ins. Co. v. Reynolds*, 36 Mich. 502.

pany would bind the insured.<sup>203</sup> While the facts in this case may warrant the conclusion, yet the question must, in all cases, be determined by the scope of the agent's authority. If, as a fact, an agency is shown to exist for both parties, and the agent is authorized to act for the assured in all matters connected with that particular insurance, then undoubtedly he may cancel or receive notice of cancellation of the policy. It would seem, however, that the evidence ought to be clear to warrant the exercise, as an agent of the assured, of the power to cancel or receive notice of cancellation. Even in the case last above referred to in the text the court says: "It may be questionable how far such notice is required when the agent of the company is also the only agent or person with whom the company has acted on behalf of the insured," and it appeared that the whole business relating to that insurance was unreservedly intrusted to the agent.<sup>204</sup>

§ 641. **Agents of Insured—Cancellation—Custom.**—As we have stated in regard to the authority of an agent to adjust losses, if by custom or usage the agent or broker, to procure an insurance, has his authority continued, or if by the usual course of business, as in England, he retains possession of the policy until the adjustment of the loss, there is no doubt but that such agent would be an agent of the assured to receive notice of cancellation. Although if the usage be that of a particular place or particular class of persons, it must be shown that the assured had knowledge thereof.<sup>205</sup> So parol evidence of usage or custom among insurance men to give such notice of termination or cancellation to the person procuring the insurance is inadmissible to vary the terms of the contract.<sup>206</sup> But an established local custom of such kind is not admissible to

<sup>203</sup> See *Newark Ins. Co. v. Sammons*, 11 Ill. App. 230; *Insurance Co. v. Radon*, 87 Ala. 311.

<sup>204</sup> See secs. 508-13, herein.

<sup>205</sup> *Bartlett v. Pentland*, 10 Barn. & C. 760. As to the custom to cancel by striking out the underwriter's signature to the policy at the time of the adjustment and settling account between the broker and underwriter, see 1 *Arnould on Insurance*, Perkins' ed., 1850, 111, 127.

<sup>206</sup> *Grace v. American Cent. Ins. Co.*, 109 U. S. 278.

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vary the contract, where it is not shown that the owner had notice or knowledge thereof.<sup>207</sup>

§ 642. **Ratification by Insured of Agent's Acts.**—A party may insure for another as principal, even without the latter's prior authority or consent. In such case, the intended principal may, even after loss, adopt or ratify the act, and such ratification is equivalent to a prior authority.<sup>208</sup> The party ratifying must be fully apprised of his rights, and have full knowledge of all the material facts, otherwise the confirmation cannot be held binding,<sup>209</sup> and an insurance can only be ratified by the person on whose account it was intentionally made.<sup>210</sup> But an agent's authority or ratification must be proved; the mere fact that it is beneficial is not conclusive.<sup>211</sup> Although there would seem to be no valid reason why the same rule would not apply to cases of agents for the insured as in other cases of agency, viz., that if a party accepts the benefits or proceeds of the agent's acts, with knowledge of the facts, he will be bound.<sup>212</sup> There may be a conditional ratification,

<sup>207</sup> *Hermann v. Niagara F. Ins. Co.*, 100 N. Y. 411; 53 Am. Rep. 197; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278; *Mutual Assur. Soc. v. Scottish Union etc. Ins. Co.*, 84 Va. 116; 4 S. E. Rep. 178; 17 Ins. L. J. 570.

<sup>208</sup> *Loring v. Proctor*, 26 Me. 18; *Finney v. Fairhaven Ins. Co.*, 5 Met. (Mass.) 192; *Dorr v. New England Ins. Co.*, 4 Mass. 221; *Miltenberger v. Beacom*, 9 Pa. St. 189; *De Forest v. Fulton Ins. Co.*, 1 Hall (N. Y.), 84; *Lucena v. Crawford*, 1 Taunt. 325; *Herkimer v. Rice*, 27 N. Y. 163; *Watkins v. Durand*, 1 Port. (Ala.) 251; *United States Ins. Co. v. Roblison*, 2 Calnes (N. Y.), 280; *Routh v. Thompson*, 13 East, 274; *Abbott v. Browne*, 1 Calnes (N. Y.), 302; *Durand v. Thouron*, 1 Port. (Ala.) 238; *Shaw v. Aetna Ins. Co.*, 49 Mo. 578; 8 Am. Rep. 150; *Mason v. Joseph*, 1 Smith (N. Y.), 406; *Snow v. Carr*, 61 Ala. 363; *Barlow v. Leckie*, 4 J. B. Moore, 8; *Owings v. Hull*, 9 Pet. (U. S.) 607; *Steinback v. Rhineland*, 3 Johns. Cas. (N. Y.) 269, per Kent, J.

<sup>209</sup> *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167; *Owings v. Hull*, 9 Pet. (U. S.) 607; *Stout v. McLachlin*, 38 Kan. 120; 15 Pac. Rep. 902.

<sup>210</sup> *Bell v. Jutting*, 1 J. B. Moore, 155; *Warring v. Indemnity Ins. Co.*, 45 N. Y. 606; 6 Am. Rep. 148.

<sup>211</sup> *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85; *Russell v. Union Ins. Co.*, 4 Dall. (C. C.) 421; *Seamans v. Loring*, 1 Mason (C. C.), 128.

<sup>212</sup> See *Hereford v. Southern Pac. Ry. Co.* (Tex. 1888), 7 S. W. Rep. 218; *Rodgers v. Empke Hardware Co.*, 24 Neb. 653; 39 N. W. Rep.

dependent upon a contingency, as where a general agent in New York for a foreign principal had acted without instructions in insuring, and notified the principal, who replied that if the vessel had not arrived safely, and other insurance was not effected, that obtained by the agent should stand. The vessel was totally lost, and no other insurance was made, and it was held that there was a ratification.<sup>213</sup> So there may be a ratification after payment of the loss,<sup>214</sup> and the agent receiving the money holds it for the owner's benefit.<sup>215</sup> A part owner's unauthorized act in effecting an insurance for the other part owners may be adopted or ratified by them.<sup>215</sup> So where one voluntarily effects an insurance for another, the bringing an action on the policy in the name of the intended principal is conclusive evidence of ratification;<sup>217</sup> and commencing suit to recover for a loss, and giving a note for the premium, is a sufficient ratification.<sup>218</sup> So where the agent gave a premium note, and signed the principal's name thereto, the acceptance by the latter of the policy which recites the fact of delivery of a deposit note ratifies the making of the note.<sup>219</sup> A neglect on the part of the principal to disaffirm an agent's act, on receiving notice thereof from the agent, raises a presumption of a ratification of what the agent has done.<sup>220</sup> But notice of the acts of an agent done in excess of his authority, to constitute silence thereafter a ratification, must not be delayed until an election to approve or disapprove would be attended with no advantage to the principal.<sup>221</sup> It has been held that an authority to insure, with knowledge that a prior insurance had

844; *Fleming v. Marine Ins. Co.*, 4 Whart. (Pa.) 59. But examine *Woodruff v. Rochester & P. R. Co.*, 108 N. Y. 39; 14 N. E. Rep. 832; *Watkins v. Durand*, 1 Port. (Ala.) 2.

<sup>213</sup> *Bridge v. Niagara Ins. Co.*, 1 Hall (N. Y.), 247.

<sup>214</sup> *Snow v. Carr*, 61 Ala. 363.

<sup>215</sup> *Miltenberger v. Beacons*, 9 Pa. St. 198.

<sup>216</sup> *French v. Backhouse*, 5 Burr. 2227; *Finney v. Fairhaven Ins. Co.*, 5 Met. (Mass.) 192; *Robinson v. Gleadon*, 2 Bing. N. C. 156.

<sup>217</sup> *Finney v. Fairhaven Ins. Co.*, 5 Met. (Mass.) 192.

<sup>218</sup> *Blanchard v. Walte*, 38 Me. 51; 48 Am. Dec. 474.

<sup>219</sup> *Monitor Ins. Co. v. Buffum*, 115 Mass. 343.

<sup>220</sup> *Emerigon on Insurance*, Meredith's ed. 1850, c. v, sec. 6, p. 117.

<sup>221</sup> *Amory v. Hamilton*, 17 Mass. 103, per Parker, C. J.

been made, ratifies the prior act.<sup>222</sup> So the other trustees may ratify an insurance effected by one of their number of the trust estate.<sup>223</sup> In another case, the company's agent, through whom the assured procured the policies, canceled them, and substituted others therefor in other companies. The assured was a foreigner, and ignorant of her rights. The acts in question were done without her knowledge or consent. After loss she brought suit on the substituted policies. It appeared, however, that this was induced by representations by said agent to her attorneys that notice of cancellation of the first policies had been properly served on her agent. It was held that there was no ratification of the agent's acts in assuming to cancel the original policies.<sup>224</sup>

**§ 643. Concealment by Assured—General Rule.**—As a premise to the principles underlying the propositions under the following sections, we will state here the general rule relating to concealment by the assured. It is well understood that the contract of insurance is one of the utmost good faith between the parties and a duty rests upon both the assured and assurer to suppress, at least in marine contracts, no material fact in relation to the subject matter of the contract which may increase the liability to loss. It is incumbent, therefore, upon a party effecting a marine policy, and it seems in England in all risks, to communicate to the underwriter every material fact or circumstance which he knows, or is bound in the ordinary course of business to know, and which may influence the underwriter in determining whether he will accept the proposal at all, or whether he will underwrite at a higher premium. This is the basis of the contract between them, and any concealment of a fact which ought to have been communicated by the assured at the time of effecting the policy, or any misrepresentation by the assured, will wholly vitiate the contract. This is also true where the fact suppressed is material at the time, even though

<sup>222</sup> *Bell v. Janson*, 1 Maule & S. 202.

<sup>223</sup> *Insurance Co. v. Chase*, 5 Wall. (U. S.) 509.

<sup>224</sup> *Niagara F. Ins. Co. v. Rader* (Ala.), 5 S. Rep. 876. See *Quong Tue Sing v. Anglo-Nevada Assur. Corp.*, 86 Cal. 566; 25 Pac. Rep. 58; 10 L. R. Annot. 144, noted under sec. 496, herein.

it afterward proves to be false, or proves not to have in reality affected the risk, or even though the loss arose from another peril. So a mistake or omission material to the risk, whether it be willful or accidental, or from mistake, negligence, or voluntary ignorance, avoids the policy, although in this country the rule is not so strict in other than marine risks.<sup>225</sup> And the same rule obtains even though the assured did not suppose the

<sup>225</sup> See chapters 42, 43, herein, on Concealment; *Proudfoot v. Montefiere*, L. R. 2 Q. B. 511, per Cockburn, C. J.; *Stoner v. Union Ins. Co.*, 3 McCord (S. C.), 387; *Washington Mills Mfg. Co. v. Weymouth Ins. Co.*, 135 Mass. 503; *Carter v. Boehm*, 3 Burr. 1903; 1 W. Black. 593; *Hoyt v. Gilman*, 8 Mass. 336; *Seamen v. Fonnercau*, 2 Strange, 1183; *Clark v. Union M. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721; *Elton v. Larkins*, 5 Car. & P. 392; *Richards v. Murdock*, 10 Barn. & C. 527; *Howe Machine Co. v. Farrington*, 82 N. Y. 126; *Moen v. Hayworth*, 10 Mees. & W. 155; *Currey v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *Neptune Ins. Co. v. Robinson*, 11 Gill & J. (Md.) 256; *Haywood v. Rodgers*, 4 East, 590; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; *Ely v. Hallett*, 2 Caines (N. Y.), 57; *Gladstone v. King*, 1 Maule & S. 35; *North British Ins. Co. v. Lloyd*, 10 Ex. 523; *Kohne v. Insurance Co. of North America*, 1 Wash. (C. C.) 161; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452; 59 Am. Dec. 684; *Blay v. Union Ins. Co.*, 1 Wash. (C. C.) 506; *Burritt v. Saratoga F. Ins. Co.*, 5 Hill (N. Y.), 188, per Bronson, J.; *Lynch v. Hamilton*, 3 Taunt. 37; 14 East, 494; *London Assur. Co. v. Mansel*, L. R. 11 Ch. D. 363; *Shirley v. Wilkinson*, Doug. 306; *Moses v. Delaware Ins. Co.*, 1 Wash. (C. C.) 385; *Stocker v. Merrimack Ins. Co.*, 6 Mass. 220. In this case the court said: "For losses incurred by a superior force, not to be prevented by human foresight, the assured may justly claim an indemnity; but not for losses incurred in his own wrong by the failure of a contrivance, or, as it would be styled in the jurisdiction of a belligerent nation, a fraud of which the agent of the assured took the risk; and for his conduct the assured is responsible: *Elton v. Larkins*, 5 Car. & P., per Lyndall, C. J.; *Blackburn v. Haslan*, L. R. 21 Q. B. D. 144; *Denniston v. Thomaston Mut. Ins. Co.*, 20 Me. 125. "A person about to effect insurance must reveal all the facts which it imports the insurers to know, before signing the policy. Pothier says that 'the good faith that should reign in this contract, as in all others, binds each of the parties to dissimulate nothing from the other of what he knows in connection with the subject matter of the contract, for such dissimulation is a fraud.' . . . But honorable merchants . . . when effecting insurance for themselves they omit no circumstance of the risks to which their insurers are about to expose themselves": Emerigon on Insurance, Meredith's ed. 1850, c. i, sec. 5, p. 18; c. xv, sec. 3, pp. 632, 634. "It is a condition precedent to every contract of marine insurance that the insured shall make a full disclosure of all facts materially af-

fact to be material.<sup>226</sup> The doctrine in this country relating to concealment is not so strict, however, in life and fire risks as in marine insurance, in case the insurer makes no express inquiries.<sup>227</sup> This question will, however, be more fully considered hereafter. The underwriter has, in addition, the right to assume that the assurer will take necessary measures, by the employment of competent and honest agents, to obtain all such information in relation to the subject matter as may, by due and reasonable diligence, be obtained through such channels of intelligence as are ordinarily in use in the commercial world.<sup>228</sup> But it is not incumbent, in the absence of proof upon the owner, to use all accessible means to ascertain the condition of the property up to the time of procuring a policy, so that the fact that he had not called at the postoffice for several days did not render the policy invalid, although, had he done so, he would have received a letter written him by the master, informing him of the loss; it not being proved that he had any cause to expect information, or that any duty rested upon him to call at the postoffice on said days.<sup>229</sup>

**§ 644. Concealment by Principal from Agent to Effect Insurance.** — In marine risks the insurance is void

fecting the risk, which are within his personal knowledge at the time the contract is made": *Blackburn v. Vigors*, L. R. 12 App. Cas. 531, per Lord Watson.

<sup>226</sup> *Vose v. Eagle Ins. Co.*, 6 Cush. (Mass.) 42; *Curry v. Commonwealth Ins. Co.*, 10 Pick. (Mass.) 535; *American Ins. Co. v. Mahone*, 56 Miss. 192; *Bunday v. Union Ins. Co.*, 2 Wash. (U. C.) 243; *Burritt v. Saratoga Ins. Co.*, 5 Hill (N. Y.), 188; *Von Lindeau v. Desborough* 3 Car. & P. 353.

<sup>227</sup> See *Browning v. Home Ins. Co.*, 71 N. Y. 508; *Hartford Protection Ins. Co. v. Hammer*, 2 Ohio St. 452; 59 Am. Dec. 684; *Clark v. Manufacturers' Ins. Co.*, 8 How. (U. S.) 235; *Wytheville Ins. Co. v. Stultz*, 87 Va. 629; *Washington Mills Mfg. Co. v. Weymouth Ins. Co.*, 135 Mass. 503; *Holmes v. Charlestown etc. Ins. Co.*, 10 Met. (Mass.) 211; *Clark v. Union Mut. Ins. Co.*, 40 N. H. 333; 77 Am. Dec. 721.

<sup>228</sup> *Proudfoot v. Montefiore*, L. R. 2 Q. B. 511, per Cockburn, C. J. See *Ruggles v. General Int. Ins. Co.*, 12 Wheat. (U. S.) 383; 4 Mason (U. S.) 74; *Blackburn v. Vigors*, L. R. 12 App. Cas. 531, per Lord Watson.

<sup>229</sup> *Neptune Ins. Co. v. Robinson*, 11 Gill & J. (Md.) 256.

if the principal withholds from his agent employed to effect a policy, information which he possesses, or ought to possess, and which the underwriter ought to know. This is so although the agent acts in good faith, and it equally applies whether such information is known by the principal at the time the order is given or subsequently obtained; provided he acquires it in time to have revoked the order or to have regulated the terms of the contract. This rule is based upon the principles stated in the preceding section, and also upon the fact that, in relation to the underwriter, the agent effecting an insurance represents and stands in place of the principal, and it is assumed that the latter will communicate to the underwriter, through the agent, all the facts necessary to be disclosed, and that he will exercise due and reasonable diligence to convey to his agent all material information acquired subsequently to giving the order, where it is probable that it will reach him before the completion of the contract.<sup>230</sup> Thus, when the plaintiff knows that the vessel containing the insured goods had sailed in bad weather, three days before another vessel which had arrived, and that fears are entertained as to her safety, the policy is avoided where such fact is not communicated to an agent at another place ordered to effect a policy.<sup>231</sup> But where a letter lay on the table of the principal, conveying intelligence of the loss at the same time the broker at another place effected the insurance, the policy was held not avoided for want of diligence in communicating such fact.<sup>232</sup>

<sup>230</sup> Hoyt v. Gilman, 8 Mass. 336; Fitzherbert v. Mather, 1 Term Rep. 12; McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170, per Story, J.; Watson v. Delafield, 2 Caines (N. Y.), 224; 1 Johns. (N. Y.) 152; 2 Johns. (N. Y.) 526; 1 Arnould on Marine Insurance, Perkins' ed., 541, side p. 437; Green v. Merchants' Ins. Co., 10 Pick. (Mass.) 402; Johnson v. Phoenix Ins. Co., 1 Wash. (C. C.) 378; Andrews v. Marine Ins. Co., 9 Johns. (N. Y.) 32; 2 Duer on Insurance, ed. 1845, 410, et seq. Emerigon says the insurance is null "if the principal was informed of the loss when he gave orders to effect insurance, although the agent may have acted in good faith. . . . So, also, if the principal, informed in time to revoke the order, has omitted to revoke it": Emerigon on Insurance, Meredith's ed. 1850, c. xv, sec. 8, p. 646.

<sup>231</sup> Vale v. Phoenix Ins. Co., 1 Wash. (C. C.) 283.

<sup>232</sup> Wake v. Atty, 4 Taunt. 493.



**§ 645. Concealment by Principal from General Agent.**

There seems to be some doubt upon the question whether the rule stated in the last section is applicable to the case of a general agent who, acting in good faith, effects insurance for his principal, without a special order and unknown to him. Marshall, basing his opinion upon Valin and Pothier, says the policy, under such circumstances, is valid where the general agent was ignorant of the loss.<sup>233</sup> Duer, however, says it is difficult to believe that any distinction exists, in this respect, between the procurement of a policy by a general agent or by an agent specially authorized, since the failure of the principal to exercise reasonable diligence to communicate knowledge material to the risk, in time to prevent the completion of the policy or to regulate its terms, is fatal in either case; that it is not by reference to the nature of the agent's authority that the validity of the insurance is to be determined; that the nature of the agent's authority cannot affect the duty of the principal to communicate material facts known to him; and that if the insurers know the authority of the agent to be general, they have a right to believe that the principal has disclosed all necessary advice and information material to the risk. And this author is also of the opinion that the ratification by the principal of an insurance made by a voluntary agent entitles the underwriter to the same defense as to concealment as if the policy had been effected under a prior authority.<sup>234</sup>

**§ 646. Concealment by Agent to Effect Insurance.—**

It is a general rule that where the employment of the agent is such that, in respect to the particular matter in question he represents the principal, the agent's knowledge is that of the principal. So the latter is as responsible for any knowledge of a material fact acquired by his agent employed to obtain the insurance, as if he had acquired it himself, and the misrepre-

<sup>233</sup> 1 Marshall on Insurance, ed. 1810, 466.

<sup>234</sup> "He who insures property with a knowledge of its actual loss is guilty of a fraud that avails the policy, and the adoption of an insurance with the same knowledge would be just as fraudulent if from the adoption alone the contract derived its legal existence":

2 Duer on Insurance, ed. 1845, 150, 531.

resentation or concealment by such agent of a material fact avoids the policy, even though the assured be innocent in the matter,<sup>235</sup> and even though the agent intended no fraud.<sup>236</sup> Emerigon says: "If at the time of signing the policy the agent who effects the insurance for account of others is informed of the loss, the insurance is null, although the principal was not so informed."<sup>237</sup> So if the broker to effect the policy is guilty of gross negligence in failing to obtain the necessary information and communicating the same to the underwriters, the policy will be discharged.<sup>238</sup> And this accords with the general rule of agency that the principal cannot profit by the fraud, concealment, or misrepresentations of his agent, even though he is innocent thereof, where the agent, in effecting the business in question, acts within the scope of his authority,<sup>239</sup> for the rule applies that if a loss must fall on one of two innocent parties, by reason of the fraud or negligence of a third party, he by whom the person guilty of the fraud or negligence has been trusted or employed must bear the loss, for by such employ-

<sup>235</sup> *Blackburn v. Vigors*, L. R. 12 App. Cas. 531, per Lords Halsbury, L. C., and Watson; *Wake v. Atty*, 4 Taunt. 493; *Hamblett v. City Ins. Co.*, 86 Fed. Rep. 118; *Pawson v. Watson*, Cowp. 785; *Sawtell v. London Assur. Co.*, 5 Taunt. 359; *Fitzherbert v. Mather*, 1 Term Rep. 12; *Russell v. Thornton*, 4 Hurl. & N. 140; *Carpentier v. American Ins. Co.*, 1 Story (C. C.), 59; 1 *Marshall on Insurance*, ed. 1810, 466; *Stewart v. Dunlop*, 4 Brown Parl. C., Tomlin's ed., 483 n.; *Mayden v. Forester*, 5 Taunt. 615.

<sup>236</sup> *Carpentier v. American Ins. Co.*, 1 Story (C. C.), 59. As to rule applicable to agents in general, see *Johnston Harvester Co. v. Miller*, 72 Mich. 265; 40 N. W. Rep. 429 (annotated case); note, "agent's knowledge, when attributable to principal," 82 Am. Dec. 722, 728. As to insurer's agents, see sec. 544, herein.

<sup>237</sup> *Emerigon on Insurance*, Meredith's ed. 1850, c. xv. sec. 8, p. 646 (marine risks).

<sup>238</sup> *Hoyt v. Gilman*, 8 Mass. 336; *Wake v. Atty*, 4 Taunt. 493; *Neptune Ins. Co. v. Robinson*, 11 Gill & J. (Md.) 256. "This condition is not complied with where by fraud or negligence of the agent the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to discover it": *Proudfoot v. Montfieri*, L. R. 2 Q. B. 511, per Cockburn, C. J.

<sup>239</sup> *Mutual B. Ins. Co. v. Cannon*, 48 Ind. 264; *National Life Ins. Co. v. Minch*, 5 Thomp. & C. (N. Y.) 545; *Morton v. Scull*, 23 Ark. 289; *Du Souchet v. Dutcher*, 113 Ind. 249; 15 N. E. Rep. 459 (annotated case); *Barber v. Button*, 20 Vt. 112.

ment or trust he has put him in a position which enables him to injure another.<sup>240</sup> So where the broker who effected the insurance omitted to read the whole of a letter, reading only such parts as he deemed material, yet suppressed a fact therein relating to the principal's apprehensions concerning the vessel's safety, it was held that there was a concealment of a material fact, and that the broker was bound to read the whole letter, and the policy was defeated.<sup>241</sup> And the same rule applies where the agent has knowledge that the ship has been lost sight of, and was when last heard of reported leaky, but fails to communicate such knowledge to the underwriter.<sup>242</sup> So if one not an agent of the company applies for insurance on behalf of another, he is the latter's agent, and the policy is avoided where he fails to state that a certain building, contiguous to the insured property, is used for keeping prohibited articles, such concealment being of facts material to the risk under the terms of the policy.<sup>243</sup> And where the correspondent was directed to cause an insurance to be effected, and employed a broker to procure a policy, and the broker knew that the master had informed the correspondent that the vessel had gone aground, and was in a sinking condition, but did not communicate the fact to the underwriter, it was held a fatal concealment.<sup>244</sup>

**§ 647. Concealment by Agent Other than one to Effect a Policy.**—In marine insurance there is a class of agents other than those employed to effect a policy, and there is certainly a conflict of authority as to how far an agent who has no power to procure or order an insurance, and whose duty

<sup>240</sup> *Proudfoot v. Montifiere*, L. R. 2 Q. B. 511, per Cockburn, C. J.; *Lynch v. Dunsford*, 14 East, 494; *Nicoll v. American Ins. Co.*, 3 Wood & M. (C. C.) 529; *Draper v. Charter Oak Ins. Co.*, 2 Allen (Mass.) 569; *Carpentier v. American Ins. Co.*, 1 Story (C. C.), 57; *Fitzherbert v. Mather*, 1 Term Rep. 12; *Gladstone v. King*, 1 Maule & S. 35; *Smith v. Empire Ins. Co.*, 25 Barb. (N. Y.) 497, per Balcom, J.

<sup>241</sup> *Richards v. Murdock*, 10 Barn. & C. 527.

<sup>242</sup> *Seamen v. Fonnerau*, 8 Strange, 1183; *Lynch v. Hamilton*, 3 Taunt. 41; 14 East, 494.

<sup>243</sup> *McFarland v. Peabody Ins. Co.*, 6 W. Va. 425.

<sup>244</sup> *Russell v. Thornton*, 4 Hem. & M. 788; affirmed 6 Hurl. & N. 140.

is limited to the mere communication of intelligence, may by his fraud or negligence affect his principal's contract, when the latter has acted in the utmost good faith. Thus: "In the case of insurance by a ship owner, it has been decided that he is affected by the knowledge of a class of agents other than those whom he employs to insure. In the ordinary course of business the owner of a trading vessel employs a master and ship agents, whose special function is to keep their employer duly informed of all casualties encountered by his ship, which would materially influence the judgment of an insurer. . . . If a master or ship agent, whether willfully or unintentionally, fail in their duty to their employer, their suppression of a material fact will, notwithstanding his ignorance of the fact, vitiate his contract."<sup>245</sup> It is said by Phillips that "A policy effected through the fraudulent misrepresentations or concealment of the master of the vessel, or any habitual agent or correspondent or recognized representative of the assured, is not binding upon the insurers."<sup>246</sup> So where the master failed to disclose a fact material to the risk, such as an accident to the ship, and had an opportunity to inform the owners before a policy was effected, and did not do so, such knowledge was declared fatal to a recovery.<sup>247</sup> In another case the consignor and shipper of the goods insured was the agent, whose knowledge was in question. He knew of the loss and could have prevented the insurance, and the policy was declared null. But he was directed, however, to give advice of the shipment to an agent who was directed to effect a policy, which he did without mentioning the loss, and his act was held a virtual misrepresentation.<sup>248</sup> These two decisions are leading English cases, and have been given much consideration, both by the courts and text-writers. They are in conflict, however, with *Ruggles v. General Interest Insurance Company*,<sup>249</sup> although that case was decided upon the point that the master's agency had ceased,<sup>250</sup> and it was intimated that

<sup>245</sup> *Blackburn v. Vigors*, L. R. 12 App. Cas. 531, per Lord Watson.

<sup>246</sup> 1 Phillips on Insurance, 3d ed., sec. 564.

<sup>247</sup> *Gladstone v. King*, 1 Maule & S. 35.

<sup>248</sup> *Fitzherbert v. Mather*, 1 Term Rep. 12.

<sup>249</sup> 4 Mason (C. C.), 74; 12 Wheat. (U. S.) 383.

<sup>250</sup> See secs. 720, 721, herein.

a virtual misrepresentation by such agent would have avoided the contract.<sup>251</sup> But the rule established by the two English decisions is upheld in *Proudfoot v. Montifiere*,<sup>252</sup> where Cockburn, C. J., referring to Duer's discussion<sup>253</sup> of the United States case, says: "We think the reasoning of the learned writer fully establishes his conclusions as to the ruling having been erroneous." But in *Proudfoot v. Montifiere*,<sup>254</sup> the agent was employed to purchase and to ship and consign cargoes to the principal, and it was held that he should have communicated to him intelligence of the loss. The case, however, turned upon the question of diligence, and will be noticed hereafter. So where the principal had directed an insurance to be effected at another city, and notice of the loss reached the office during his absence, it was held to be the duty of his clerks to countermand the order.<sup>255</sup> There is no doubt but that if an agent has charge of another's business, it is his duty to notify the principal of all material facts affecting the latter's interest in connection with that particular business, and of which the agent has, or ought to have, knowledge.<sup>256</sup> So that if the agent is one whose employment is such that he is bound to communicate material knowledge possessed by him to the assured, the assured is bound by such knowledge, even though he himself acts bona fide, provided that the agent could, by the exercise of due and reasonable diligence, have communicated his information to the assured before the completion of the insurance.<sup>257</sup> But if the agency is not for any purpose connected with the policy or its procurement, and is not such that it may be supposed that the agent has knowledge, in the course of his employment, like the master of a vessel, the insured is not affected by his

<sup>251</sup> *Id.*, per Story, J.

<sup>252</sup> L. R. 2 Q. B. 511.

<sup>253</sup> Vol. 2, ed. 1845, 423, et seq.

<sup>254</sup> L. R. 2 Q. B. 511.

<sup>255</sup> *Byrnes v. Alexander*, 1 Brewst. (Pa.) 213.

<sup>256</sup> *Proudfoot v. Montifiere*, L. R. 2 Q. B. 511, per Cockburn, C. J. As to the rule relating to agents in general, see *Baldwin v. St. Louis etc. Ry. Co.*, 75 Iowa, 297; 39 N. W. Rep. 507 (annotated case).

<sup>257</sup> *Blackburn v. Vigors*, L. R. 12 App. Cas. 531; *Clement v. Phoenix Ins. Co.*, 6 Blatchf. (C. C.) 481; *General Int. Ins. Co. v. Ruggles*, 12 Wheat. (U. S.) 411; 2 Duer on Insurance, ed. 1845, 420, sec. 27, et seq.

knowledge, for the mere fact that he is the assured's agent does not of itself alone establish knowledge on the part of the assured, for "to lay down, as an abstract proposition of law, that every agent, no matter how limited the scope of his agency, could bind every principal even by his acts, is obviously, and upon the face of it, absurd."<sup>258</sup> So notice to the carrier's agent is not notice to the insured, such notice being given to the carrier at one city and the consignee effecting the policy in another city.<sup>259</sup> And where an agent to procure a policy applies to the company's agent, and fully acquaints him with the facts, and he applies, of his own accord, to the agent of another company to carry part of the risk, his concealment does not affect the assured, there being no communication between the agent of the second company and the assured's agent.<sup>260</sup>

§ 648. **Concealment Where Agency has Ceased.**—In *Rugles v. General Interest Insurance Company*,<sup>261</sup> the policy in question was effected several days after a total loss had occurred. The master not only neglected to advise the owner of the loss, but purposely took steps to prevent advices thereof from reaching him. The owner had no knowledge of the loss, nor of the fraudulent intent of the master, and it was held that the policy was not invalidated; that by the total loss the agency for the assured was determined, and the master became the underwriter's agent.<sup>262</sup> In *Blackburn v. Vigors*<sup>263</sup> a policy of reinsurance was effected, but neither the plaintiffs nor the agent who procured the policy had any knowledge of the material fact alleged to have been concealed. But an agent who had procured the original insurance, and who had attempted to effect a policy of reinsurance, although not the one in suit, had received the particular information relied on while acting as such agent, and had not communicated the same. The policy

<sup>258</sup> *Blackburn v. Vigors*, L. R. 12 App. Cas. 531, per Lord Halsbury, L. C.

<sup>259</sup> *Clement v. Phoenix Ins. Co.*, 6 Blatchf. (C. C.) 481.

<sup>260</sup> *May v. Western Assur. Co.*, 27 Fed. Rep. 260.

<sup>261</sup> 4 Mason (U. S.), 74; 12 Wheat. (U. S.) 383.

<sup>262</sup> See criticism of this case in 2 Duer on Insurance, ed. 1846, 423, sec. 29, et seq.

<sup>263</sup> L. R. 12 App. Cas. 531.

was, however, declared to be valid. We quote from the opinions given: "A broker is employed to effect a particular insurance. While so employed he receives material information; he does not effect the insurance, and he does not communicate the information. How is it possible to suggest that the assured could rely upon the communication to the principal of every piece of information acquired by an agent, through whom the assured has unsuccessfully endeavored to procure an insurance? . . . . Where a person is an agent to know, his knowledge does bind the principal. But in this case, I think the agency of the broker had ceased before the policy sued upon was effected. The principal himself, and the broker through whom the policy sued on was effected, were both admitted to be unacquainted with any material fact which was not disclosed. . . . . What, then, is the position of the broker in this case, whose knowledge, though not communicated, is held to be that of the principal? . . . . He had no general agency; he had no other authority than the authority to make the particular contract, and the authority ended before the contract sued on was made. When it was made, no relation between him and the shipowner existed which made or continued him an agent, for whose knowledge his former principal was responsible. There was no material fact known to any agent which was not disclosed at the point of time at which the contract was made. There was no one possessed of knowledge whose duty it was to communicate such knowledge." <sup>264</sup> "In the present case, it is sought to extend the imputed knowledge of the insured to all facts which, during the period of his employment, became known to any agent, other than the agent effecting the policy in question, who was employed at any time, successfully or unsuccessfully, to insure the whole or part of the same risk with that covered by the policy. . . . . I am of the opinion . . . . that the responsibility of an innocent insured for the noncommunication of facts which happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk, ought not to be carried beyond the person who actu-

<sup>264</sup> Per Lord Halsbury, L. C.

ally makes the contract on his behalf. There is no authority whatever for enlarging his responsibility beyond that limit, unless it is to be found in the decisions which relate to captains and ship agents; and these do not appear to me to have any analogy to the case of agents employed to effect a policy. There is a material difference in the relations of these two classes of agents to their employer. The one class is specially employed for the purpose of communicating to him the very facts which the law requires him to divulge to his insurer; the other is employed, not to procure or furnish information concerning the ship, but to effect an insurance. . . . It cannot be reasonably suggested that the insurer relies, to any extent, upon the private information possessed by persons of whose existence he presumably knows nothing. . . . There may be circumstances which impose upon agents, in the position of 'the agent here,' an express or implied duty to communicate their own information to their principal, but nothing of that sort occurs here." <sup>265</sup>

**§ 649. Concealment by Agent—False Advices—Loss by Another Peril.**—The rule that concealment of a material fact by an agent to effect a policy avoids the contract applies, even though the information concealed proves to be false or the loss be occasioned by another peril; for the effect of a concealment depends upon the materiality to the risk at the time when the policy is effected, and not upon the subsequent event. Material facts ought to be disclosed when known.<sup>266</sup> Emerigon says: "If, on false advice of the loss of your vessel, you cause it to be insured, the insurance is null, and the insurers shall not be answerable for any subsequent disaster. . . . The crime consists in the intention, and the fraudulent act is never to profit its own author." <sup>267</sup> The two cases

<sup>265</sup> Per Lord Watson.

<sup>266</sup> 1 Arnould on Marine Insurance, Perkins' ed., 542; Durrell v. Bederly, 1 Holt, 104; Hoyt v. Gilman, 8 Mass. 336; Lynch v. Hamilton, 3 Taunt. 41; 14 East, 494; Seamen v. Fonnerau, 2 Strange, 1183; 2 Duer on Insurance, ed. 1846, 392, 511, et seq.; 1 Phillips on Insurance, 3d ed., 372, sec. 676. See Walden v. Louisiana Ins. Co., 12 La. 134.

<sup>267</sup> Emerigon on Insurance, Meredith's ed. 1850, c. xv, sec. 4, p. 642.



formation could be probably expected to arrive in time. That his permitting the letter containing the order to be transmitted, without endeavoring to counteract its effect, must be deemed, if not a misrepresentation, at least so gross a neglect as to avoid the contract.<sup>277</sup> In *Proudfoot v. Montifiere*,<sup>278</sup> the insurance was on a cargo, lost or not lost, shipped at Smyrna, on a voyage from there to Liverpool, for and on account of the plaintiff, a merchant at Manchester and Liverpool, consigned to him by his agent resident there, who had purchased and shipped the same in the course of his employment. Several days before the sailing of the ship said agent forwarded the invoice and weights of shipment in time to effect insurance, and a few days thereafter, and before sailing, forwarded the bill of lading. The ship was stranded, and became a total loss four days after this last letter was sent. The agent was informed of the loss the day after it occurred, and two days thereafter, which was the first post day, he communicated by letter to the plaintiff the loss, saying, also: "I hope to goodness you are fully insured. . . . Lloyds' agents have telegraphed the disaster, which will reach London before my letter . . . enclosing the bill of lading. I did not dare telegraph to you, for when once you had the intelligence in hand you were prevented from insuring." Before the receipt of this letter the plaintiff gave instructions to effect a policy, and the slip was signed by the company's agent at Manchester. The plaintiff had no knowledge of the loss at the time. It was held that it was plainly the duty of the agent at Smyrna to have communicated, by telegraph, the disaster to the cargo, and that there could be no recovery on the policy. Again, where the question was whether the partner who directed the insurance and had knowledge of the loss was bound to send intelligence thereof by a steamer, which, if done, it would have reached the place where the insurance was effected in time to have prevented it, and it was held that it was only necessary to send notice by the earliest and most expeditious, usual, known route of mercantile communication,

<sup>277</sup> *Watson v. Delafield*, 2 Johns. (N. Y.) 526; 1 Johns. (N. Y.) 152;

<sup>2</sup> *Caines* (N. Y.), 224.

<sup>278</sup> L. R. 2 Q. B. 511.

and that it was properly left to the jury whether a steamer was such route between the points in question.<sup>279</sup> So if the shipper knew of the loss, and could have communicated the same to the consignee by the same mail by which he advised him of the lading of the ship, and the consignee, in ignorance of the loss, effected a policy, it was held that the shipper was the consignee's agent, and the policy invalid.<sup>280</sup> But in a New York case the master was part owner of a vessel, on which insurance was effected by the other part owners, as well on their own account as on that of the others. The vessel had been lost about two weeks prior to the date of procuring the insurance, but of this loss the part owners effecting the policy had no knowledge or information, and the insurer was not informed thereof. The master had not directed the insurance, nor did he know of the intention to insure. It was held that only such ordinary diligence was required as a common prudence and discretion would demand from the nature of such mercantile concerns, and a recovery on the policy was adjudged; although it was intimated that had the master ordered the insurance, or known that it was intended, the policy would have been invalidated, if anything like gross negligence in communicating the loss to the partners had existed.<sup>281</sup>

<sup>279</sup> *Green v. Merchants' Ins. Co.*, 10 Pick. (Mass.) 402. The rule laid down in this case is criticised (2 Duer on Insurance, ed. 1846, 533) on the ground that it may frequently happen that there is no usual route of mercantile communication, and that the rule would therefore be inapplicable in many cases.

<sup>280</sup> *Fitzherbert v. Mather*, 1 Term Rep. 12.

<sup>281</sup> *Andrews v. Marine Ins. Co.*, 9 Johns. (N. Y.) 32. "These terms, 'due and reasonable diligence,' are exceedingly vague, and, without a further definition, a jury, unless there is apparent fraud, will frequently err in their application. There are no words that are more liable to be variously interpreted, even where the facts are substantially the same, by different judges, as well as by juries. . . . In cases where the party on whom the duty of communicating a loss devolves has no special reason for believing or suspecting that an insurance which he may prevent is intended, the rule followed by the supreme court of New York, in *Andrews v. Marine Ins. Co.*, 9 Johns. (N. Y.) 32, seems proper to be adopted. It is ordinary diligence alone that should then be exacted; or, to speak more accurately, the negligence that should alone be permitted to avoid the policy must be of such a character as to raise the presumption of a fraudulent design": 2 Duer on Insurance, ed. 1846, 533, 534.

## CHAPTER XXIII.

### AGENTS—DUTIES—LIABILITIES.

- § 655. Duties of agents—Generally.
- § 656. Duties of insurer's agents—Generally.
- § 657. Duties of agent of insured—Generally.
- § 658. Duties of agent to inform principal.
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- § 667. Where agent's orders vest him with discretion.
- § 668. When agent is excused for noncompliance with instructions.
- § 669. Duty to insure.
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- § 672. Duty as to premium.
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- § 675. Duty to effect other insurance in case of insurer's insolvency.
- § 676. Duty of agent to settle loss.
- § 677. Duty and liability as to payment of loss—Agent.
- § 678. Liability of agent—Generally.
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- § 680. Liability of voluntary or gratuitous agent.
- § 681. Liability of agent for the premium.
- § 682. Liability for concealment—Agent.
- § 683. Liabilities of officers of the company.
- § 684. Liability of company for agent's frauds, etc.

§ 655. Duties of Agents—Generally.—What constitutes the duty of an agent must depend, in some measure, upon the character of the agency and the nature of his employment, as is illustrated where the agent's authority arises impliedly in a case of special emergency in one instance, and, in another, where he acts under special instructions, and still again, where

he acts under general orders. It may depend upon the degree of skill which he professes to possess, or which the nature of his business would justify his employer in believing him to possess. His agency may be such that he does not claim to possess, and in fact is known by the principal not to possess, any particular skill or knowledge in the matter of the employment. So, also, some question has arisen as to the degree of responsibility that rests upon a voluntary agent who, without compensation or expectation thereof, agrees to perform an act, but never attempts to fulfill his promise. Again, we have noted in the preceding section that the degree of diligence required of certain agents in communicating intelligence may differ from that necessitated on the part of other agents. Usage is frequently an important factor, entering into the determination of the question of an agent's duty. The very contract itself may impose a special duty, as in case of *del credere* agents, who receive higher commissions. So the responsibility may be shifted, as by the substitution of another agent under instructions of the principal, or by usage. An agent's duty may also depend upon whether he is invested with an absolute discretion, or whether his orders are peremptory. These points will be considered under the sections next following.

**§ 656. Duties of Insurer's Agents—Generally.**—An agent for the company must comply with instructions, must exercise good faith and reasonable diligence in discharging his duties to his principal, must remit all moneys received in its behalf to the company, must advise it of changes material to the risk and must be careful in selecting risks. If his instructions are not absolute, but leave him a discretion, he must exercise that discretion honestly and in the utmost good faith. If he be a subagent under a superior, he may be required to obey the superior's orders in matters relating to the insurances procured by him. An agent's duties may also depend upon express contract, or upon the by-laws, rules, and regulations of the company, or upon custom, usage, or a customary course of business.<sup>1</sup> So an agent to whom advances are made to further

<sup>1</sup> See secs. 667-71, herein; *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409; 31 N. W. Rep. 454, per Vanderburgh, J.; *Washington F. & M. Ins. Co.*,

the interests of the company's business must account for the use of the money so advanced;<sup>2</sup> and it is obligatory upon any agent to discharge his duties and trusts faithfully, and if he departs from the line of his duty he is liable.<sup>3</sup> So it is the duty of a treasurer of an insurance company to receive and account for money,<sup>4</sup> and an agent may be obligated by custom to account monthly.<sup>5</sup> But where the agent, acting in good faith, induces the company to issue a policy on a building, which was in fact unoccupied, although intended to be used soon as a hotel, and it was burned, the agent was held not liable. The rate of premium was greater, however, than would have been charged for an unoccupied hotel, and the risk was not greater than represented. The case turned upon the point that it was only a question of rates.<sup>6</sup>

**§ 657. Duty of Agent of Insured—Generally.**—It may be generally stated that if an agent accepts an order to insure, he may not exceed his authority or depart from his instructions; he must exercise due caution and skill in framing the policy, and be careful that it effectually covers the property to be insured; he is bound to exercise such reasonable skill and ordinary diligence as may fairly be expected from a person in his profession or situation, and must do what is usual to effect the policy. He is obligated to exercise the strictest veracity and candor toward both his employer and the insurer. While he is not liable, except he be a *del credere* agent, or except he be guilty of fraud or gross negligence, for the insolvency of the

*v. Cheseboro*, 35 Fed. Rep. 477; *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85; 41 Am. Rep. 196; *State Ins. Co. v. Jamison*, 79 Iowa, 245; 44 N. W. Rep. 371; *McMahon v. Franklin*, 38 Mo. 548; *Devall v. Burbridge*, 4 Watts & S. (Pa.) 305; *Hancock v. Gomez*, 50 N. Y. 608; 58 Barb. (N. Y.) 490; *Harvey v. Turner*, 4 Rawle (Pa.), 223; *Brink v. Dolsen*, 8 Barb. (N. Y.) 337.

<sup>2</sup> *Northwestern M. L. Ins. Co. v. Mooney*, 108 N. Y. 118; 15 N. E. Rep. 303; 3 N. Y. (L. ed.) 608; 10 Cent. Rep. 488.

<sup>3</sup> *Michoud v. Gerard*, 4 How. (U. S.) 554, per Swayne, J.

<sup>4</sup> *Portage Co. Mut. Ins. Co. v. Wetmore*, 17 Ohio, 330.

<sup>5</sup> *British-American Assur. Co. v. Nell*, 76 Iowa, 645; 41 N. W. Rep. 382.

<sup>6</sup> *State Ins. Co. v. Richmond*, 71 Iowa, 519; 32 N. W. Rep. 496.

assurer, still ordinary prudence requires that he should exercise due caution in selecting the insurer and ascertaining whether he is of good credit and standing, and such agent should effect a policy on the best terms that reasonable diligence will enable him to obtain.<sup>7</sup> It is the agent's duty to keep his principal informed fully of all matters material to his interests, and transmit to him accounts of his transactions in the business intrusted to his care. Nor can he retain the policy, his liens being satisfied, but must deliver it to his principal on request.<sup>8</sup> So agents and brokers are responsible to the assured for representations made by them without authority;<sup>9</sup> and where factors, having effected an insurance on tobacco, charged the principal double the rates paid by them, they were held insurers of the principal, and the policies reinsurances for their own benefit.<sup>10</sup> But an agent may not be liable where he acts in good faith, as where a correspondent, who was referred to for orders, acting bona fide, ordered the ship into a blockaded port, where she was taken and captured.<sup>11</sup> Where the policy is given into possession of the agent, he must fulfill whatever obligations the extent of such agency warrants, which will depend upon whether the delivery was for a special purpose or for such pur-

<sup>7</sup> Emerigon on Insurance, Meredith's ed. 1850, c. v, sec. 6, p. 111; c. v, sec. 8, p. 119. See *Fornin v. Oswald*, 3 Camp. 357; *Wilkinson v. Coverdale*, 1 Esp. 74, per Buller, J.; *Park v. Hammond*, Holt N. P. 80; 4 Camp. 144; 1 *Marshall on Insurance*, ed. 1810, 297-300; *Ela v. French*, 11 N. H. 357; 2 *Duer on Marine Insurance*, ed 1846, 184, et seq.; *Wallace v. Telfair*, 2 Term Rep. 188, note; 1 *Arnould on Marine Insurance*, Perkins' ed. 149, sec. 72, et seq.; *Story on Bailments*, 3d ed., sec. 435; *Mechanics' Bank v. Merchants' Bank*, 6 Met. (Mass.) 13, per Shaw, C. J.; *Fitzherbert v. Mather*, 1 Term Rep. 12; *Moore v. Mourge*, Cowp. 479; *De Tastet v. Oroussikat*, 2 Wash. (C. C.) 132; *Chapman v. Walton*, 10 Bing. 52; *Wake v. Atty*, 4 Taunt. 493. See as to general rule concerning agents, *Greenleaf v. Moody*, 13 Allen (Mass.), 363; *Howard v. Grover*, 28 Me. 97; *Burrill v. Phillips*, 1 Gall. (C. C.) 360; *Stevens v. Walker*, 55 Ill. 151; *Robinson v. Illinois R. R. Co.*, 30 Iowa, 401; *Whitney v. Merchants' Union Express Co.*, 104 Mass. 152; *Cass v. Boston etc. R. R. Co.*, 11 Cush. (Mass.) 70.

<sup>8</sup> 2 *Duer on Insurance*, ed. 1846, 270, sec. 56. See *Dewall v. Burbridge*, 4 Watts & S. (Pa.) 305; *Harvey v. Turner*, 4 Rawle (Pa.), 223.

<sup>9</sup> *Pawson v. Watson*, Cowp. 787.

<sup>10</sup> *Miller v. Tate*, 12 La. Ann. 160.

<sup>11</sup> *Liotard v. Graves*, 3 Calnes (N. Y.), 226.

pose as the prior relations and course of dealings between the agent and the principal warrants, and the agent is liable for misfeasance and neglect in the execution of whatever duties it is incumbent upon him to perform.<sup>12</sup>

**§ 658. Duty of Agent to Inform Principal.**—It is incumbent on an agent to communicate promptly to his principal all material knowledge and facts possessed by him relating to the risk or to the business intrusted to his care, and which it is important that the principal should know. He is bound to act in good faith and honesty in his representations to his principal, and in answering his inquiries. Any material representation or concealment of the agent may affect the validity of the contract, equally as if made by the assured. This information should be thorough and accurate, for fidelity, veracity, and candor toward the principal are required.<sup>13</sup> It is likewise obligatory upon the assurer's agent procuring an application, not only to write the answers truly as given by the applicant, but he must also communicate to his principal any other fact material to the risk, whatever may be the source of his knowledge.<sup>14</sup> So if an agent insure a building, knowing certain facts material to the risk, and which the policy requires to be stated, and does not disclose them to the company, which sustains a loss upon the policy, he is liable to it therefor, but it can only recover nominal damages in an action against the agent, unless the premium charged was less than that usually taken on such risks, in which case the difference in rates could be recovered.<sup>15</sup> And where the agent is required, upon the day of issuing the policy, to make a report of the risk completely describing the property, and he fails to do so until after the property is burned, by reason of which the company is deprived of the right, under the terms of the policy, to cancel the

<sup>12</sup> *Shurtleff v. Whitfield*, 2 Brev. (S. C.) 71; 2 Phillips on Insurance, 3d ed. 551, sec. 1891.

<sup>13</sup> See secs. 646-49, herein; *Harvey v. Turner*, 4 Rawle (Pa.), 223 (agent of insured); *Seamen v. Fonnereau*, 2 Strange, 1183 (agent of insured); *Dewall v. Burbridge*, 4 Watts & S. (Pa.) 305 (agent of insured); 1 Marshall on Insurance, ed. 1810, 298-300.

<sup>14</sup> *Ryan v. World Mut. L. Ins. Co.*, 41 Conn. 168, per Carpenter, J.

<sup>15</sup> *Pierce v. People*, 106 Ill. 11.

same, an action will be against the agent for failure to perform his duty.<sup>16</sup> And the assurer is bound, notwithstanding the cancellation of a policy by the agent of the company, where it appears that he had no express authority or general power to do such act.<sup>17</sup>

**§ 659. Effect on Insured of Agent's Neglect of Duty to Insurer.**—If an agent with authority to act, neglects to report to the company any facts which his duty requires, such neglect does not invalidate his acts, so far as the insured is concerned. Thus, the insured is not affected by the omission of the company's agents to comply with instructions to transmit to the company copies of the written parts of all policies issued by the agents, and of any indorsements made thereon by them.<sup>18</sup> So the company may be liable where the agent fails, without the applicant's fault, to transmit the application until after a loss,<sup>19</sup> nor can the company claim a forfeiture from the neglect of the assured to furnish the necessary proofs of death, where the delay arises from its agent's neglect to transmit blanks furnished him to the claimant, and afterward delays sending them to the company.<sup>20</sup> And where there is no evidence connecting the principal with the agent's acts, it is no defense to an action on the policy by the assured that the agent had not reported the cancellation of a previous policy and the issuance of the one in suit.<sup>21</sup> So where a company instructs an insurance broker to obtain payment of the premium when the application is made, it is liable for the premium so paid on a risk which it refused to take, the assured not knowing of the instructions.<sup>22</sup> And a benefit association, whose groves are, under its constitution, its agents to collect and transmit its members' dues, is liable for the amount payable in case of the

<sup>16</sup> *State Ins. Co. v. Jamison*, 79 Iowa, 245; 44 N. W. Rep. 371.

<sup>17</sup> *United States F. & M. Ins. Co. v. Tardy*, 2 Ins. L. J. 673.

<sup>18</sup> *Gloucester Mfg. Co. v. Fire Ins. Co.*, 5 Gray (Mass.), 497; 86 Am. Dec. 376.

<sup>19</sup> *Fish v. Cottenet*, 44 N. Y. 538.

<sup>20</sup> *Travelers' etc. Co. v. Edwards*, 122 U. S. 457; 7 S. C. Rep. 1249.

<sup>21</sup> *Germania Ins. Co. v. McKee*, 94 Ill. 494.

<sup>22</sup> *Gentry v. Connecticut Mut. L. Ins. Co.*, 15 Mo. App. 215.



death of a member, where his assessments have been fully paid at the time of his decease to the local grove, although the latter have not transmitted the same to the association, and although it is provided that every member shall forfeit his claim to any moneys where his assessments are not paid to the directory which was elected by the several groves.<sup>23</sup> So the company is bound, although the policy be delivered the assured by the agent in violation of the company's instructions, which are unknown to the assured.<sup>24</sup> And it may be generally stated that the knowledge, mistakes, and omissions of an agent are those of the principal, where the agent is authorized to act concerning the particular matter to which the knowledge, mistake, or omission relates.<sup>25</sup>

**§ 660. Agent cannot Issue Policy to Himself.**—An insurance agent cannot act as agent of the company in procuring insurance for himself. In such case he acts for himself, whether the application is made directly or indirectly;<sup>26</sup> and a subagent, with authority to receive and forward applications for approval to the general agent, and to make temporarily binding contracts, subject to rejection by the company, cannot bind the latter by an insurance made by him on his own property.<sup>27</sup> So where the company, without knowledge that the postmaster of a town is also the insured, sends the former a premium note for collection, he cannot bind the company by paying the premium to himself, and canceling the note after the policy is suspended;<sup>28</sup> nor can an agent effect insurance in his principal's company on property in which he is part owner.<sup>29</sup> But the company may ratify the insurance so effected, provided it has

<sup>23</sup> *Schmeek v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis. 369.

<sup>24</sup> *Miller v. Life Ins. Co.*, 12 Wall. (U. S.) 285.

<sup>25</sup> *Beal v. Park Ins. Co.*, 16 Wis. 257; *United etc. Ins. Co. v. Insurance Co. of North America*, 42 Id. 588; *Hough v. City F. Ins. Co.*, 29 Conn. 10.

<sup>26</sup> *Spare v. Home Mut. Ins. Co.*, 19 Fed. Rep. 14; *Glens Falls Ins. Co. v. Hopkins*, 16 Brad. 220.

<sup>27</sup> *Bentley v. Columbia Ins. Co.*, 19 Barb. (N. Y.) 595; 17 N. Y. 421.

<sup>28</sup> *Harle v. Council Bluffs Ins. Co.*, 71 Iowa, 401; 32 N. W. Rep. 376.

<sup>29</sup> *Ritt v. Washington Mut. & F. Ins. Co.*, 41 Barb. (N. Y.) 353.

full knowledge of the facts.<sup>30</sup> These authorities are in accord with the general rule that an agent cannot act both for himself and his principal in relation to the same matter.<sup>31</sup>

§ 661. **Agent cannot Act for Both Parties.**—A party employing an agent is entitled to the benefit of his skill and judgment. The agent's duty to his principal requires that he should act in the latter's behalf, certainly with such discretion and with such due regard to his interests, as a fair business man would exercise in his own affairs; nor can such agent, consistently with his principal's interest, represent the adverse party in the same transaction in which he acts for his principal. He cannot act for both parties in making a contract, where each relies upon his discretion, skill, and judgment.<sup>32</sup> But where the agent so acts, the contract is, however, only voidable. It may be repudiated by either party, or it may be affirmed.<sup>33</sup> Thus, where an agent represented two insurance companies, and one of them directed him to reduce a line of insurance by either reinsuring or canceling the risks, it was held that he could not act as agent for both parties by placing reinsurance in the other company, and that no recovery could be had on the contract of reinsurance so placed.<sup>34</sup> The same rule obtains where an agent of two companies places a risk in one, and rein-

<sup>30</sup> *Pratt v. Dwelling-House Mut. F. Ins. Co.*, 130 N. Y. 206; 53 Hun (N. Y.), 101.

<sup>31</sup> *Empire State Ins. Co. v. American Cent. Ins. Co.*, 138 N. Y. 446; 64 Hun (N. Y.), 485; *Neuendorf v. World Mut. L. Ins. Co.*, 60 N. Y. 389; *Gould v. Gould*, 36 Barb. (N. Y.) 270. See *Bain v. Brown*, 56 N. Y. 285; *Armstrong v. Elliott*, 29 Mich. 485; *Everheart v. Searle*, 71 Pa. St. 256; *Conkey v. Bond*, 36 N. Y. 427; 34 Barb. (N. Y.) 276; 3 Abb. N. S. 415; *Story on Agency*, p. 239; 1 *Parsons on Contracts*, 7th ed., 93, \*87.

<sup>32</sup> *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; 20 Barb. (N. Y.) 468; *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. (N. Y.) 132; *Copeland v. Mercantile Ins. Co.*, 6 Pick (Mass.) 197; *Tasker v. Kenton Ins. Co.*, 58 N. H. 469. See, also, note 46 Am. Rep. 313, 319.

<sup>33</sup> *New York Cent. Ins. Co. v. National Prot. Ins. Co.*, 14 N. Y. 85; 20 Barb. (N. Y.) 468; *People's Ins. Co. v. Paddon*, 8 Brad. 447; *Greenwood v. Spring*, 54 Barb. (N. Y.) 375.

<sup>34</sup> *Empire State Ins. Co. v. American Cent. Ins. Co.*, 138 N. Y. 446; 64 Hun (N. Y.), 485.

sures in the other, and in such case evidence of similar transactions is inadmissible.<sup>35</sup> These authorities are in accord with the general principle of law that a person cannot be the agent of both parties, whether the agency relates to insurance or other contracts;<sup>36</sup> for "no agent will ever be allowed to take upon himself incompatible duties and characters, or to act in a transaction where he has an adverse interest or employment."<sup>37</sup> In conclusion, the general rule may be thus stated: If one acts by an agent, whether insured or insurer, he is entitled to the exclusive services of the agent in the transaction, and to the full benefit of the agent's judgment and ability in making terms with the other party, and if the same person assumes to act for both parties to a bargain, he takes upon himself duties which are incompatible, and a contract made by him in such double capacity may be avoided by either party, unless made by the express authority of the principal, or subsequently ratified by him, with full knowledge of the facts, and the principal, not having authorized or ratified the acts of such agent, may repudiate the transaction without regard to any question of actual fraud or of benefit or detriment accruing to him from such acts.<sup>38</sup> In this case the agents effecting the policy were the local agents of the insurer, and general agents of the insured, and, as agents of the former, contracted with themselves as agents of the latter.

**§ 662. Same Subject—Exception to Rule.**—As we have stated elsewhere, a broker in England may be the agent of the

<sup>35</sup> *Mercantile Mut. Ins. Co. v. Hope Ins. Co.*, 8 Mo. App. 408.

<sup>36</sup> See *Hinckley v. Arey*, 27 Me. 362.

<sup>37</sup> *Ewell's Evans on Agency*, p. 18. See note "Representing adverse interests," 46 Am. Rep. 37, 38. See *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 208; 17 N. E. Rep. 496; *Bunton v. Palm (Tex.)*, 9 S. W. Rep. 182. For cases where both parties agree, see *Rowe v. Stevens*, 3 Jones & S. (N. Y.) 189; *Lloyd v. Calston*, 5 Bush (Ky.), 587. *Examine Fitzsimmons v. Southern Ex. Co.*, 40 Ga. 330; 2 Am. Rep. 577.

<sup>38</sup> *British-American Assur. Co. v. Cooper* (Colo. 1895), 40 Pac. Rep. 147, 148; 25 Alb. L. J. (N. S., Vol. 5) 437, 439, per Thompson, J.; citing *New York Cent. Ins. Co. v. National Prot. Ins. Co.*, 14 N. Y. 85; *Utica Co. v. Hope Ins. Co.*, 8 Mo. App. 408; *Lee v. Smith*, 84 Mo. 304; 1 May on Insurance, sec. 125; *Mechem on Agency*, sec. 67.

insured in effecting the policy in matters connected therewith, and of the underwriter in relation to the premium. He may also represent the insurer in delivering the policy.<sup>39</sup> The agency for the underwriter, in relation to the premium and the system of credits connected therewith, is, however, sanctioned by usage long existing there. It is held that the rule that an agent cannot act for both parties does not preclude an agent from acting for both parties where he acts in certain matters for one party, and then in different transactions for the other party, even though the parties are insurer and insured, and the acts are done in relation to the insurance;<sup>40</sup> nor does the rule preclude an agent from acting for two principals in their mutual transactions.<sup>41</sup> If an agent, acting for both parties, informs assured that he is agent for several companies, and insures in one of them according to directions, he is agent of insured.<sup>42</sup>

**§ 663. Agent Should Notify Principal of Refusal to Accept Order.**—It is incumbent upon an agent or broker who refuses to accept an order to effect insurance, to promptly notify his correspondent of his refusal, in order that the latter may be enabled to protect himself elsewhere. A failure to give such notice implies a consent to the employment, equally binding as an express acceptance, and rendering the agent responsible to the principal for neglect to fulfill the order.<sup>43</sup> And the same obligation exists even though the party receiving the order be not a regular insurance broker.<sup>44</sup>

\* See *Accy v. Ferine*, 7 Mees. & W. 151; *Shea v. Clarkson*, 12 East, 510, per Lord Ellenborough; 1 Arnould on Insurance, Perkins' ed., 122, 123, sec. 64.

\* *East Texas F. Ins. Co. v. Blum*, 13 S. W. Rep. 572; *Sparrow v. Mutual B. L. Ins. Co.*, 22 Fed. Cas. 888; citing 2 May on Insurance, 3d ed., 500.

\* *Adams Mining Co. v. Senter*, 26 Mich. 73, per Campbell, J. As to voluntary employment of another's agent, see *Fitzsimmons v. Southern Exp. Co.*, 40 Ga. 330; 2 Am. Rep. 577.

\* *British-American Assur. Co. v. Cooper* (Colo. 1895), 40 Pac. Rep. 147; 25 Alb. L. J. (N. S., Vol. 5), 437.

\* *Emerigon on Insurance*, Meredith's ed. 1850, c. v, sec. 8, p. 119; *Smith v. Lascelles*, 2 Term Rep. 187, per Ashurst, J.; 2 Duer on Insurance, ed. 1846, 120, et seq.

\* *Callender v. Oelrichs*, 5 Bing. N. C. 58.

**§ 664. Agent Should Notify Principal of Failure to Effect Insurance.**—Where an obligation rests upon an agent to procure insurance, he should give immediate notice of his inability to insure, and where the order given by a foreign correspondent is a special one, as to the terms on which the policy is to be effected, and the agent is unable to execute the orders on the prescribed terms, he must promptly give notice thereof, and is liable for his neglect so to do. He is also responsible if he obtains a policy on different terms.<sup>45</sup>

**§ 665. Agent Must Follow Instructions.**—Where an agent to procure insurance receives clear and explicit instructions, he must comply strictly therewith, and is liable to his principal for damages resulting from his acts, omissions, or mistakes justly imputable to his fraud or negligence in not complying therewith.<sup>46</sup> So an agent of the insurer is bound to make good any loss or damage arising from any negligent omission on his part in departing from instructions.<sup>47</sup> But an agent is not, however, liable for every mistake made in executing his orders.<sup>48</sup> It is important in all cases to determine whether the agent's instructions or orders are absolute, or vest him with a discretion. Where they are absolute and unqualified, he must comply strictly with their terms. The orders must be exactly followed if practicable, nor is the agent excused, whether he represent the insurer or insured, for noncompliance with such orders, no matter how honest his motives or

<sup>45</sup> *Corlett v. Gordon*, 3 Camp. 472; *De Tastet v. Croussilat*, 2 Wash. (C. C.) 132; *Smith v. Lascelles*, 2 Term Rep. 187; 1 *Arnould on Marine Insurance*, Perkins' ed., 152, et seq.; *Callender v. Oelrichs*, 5 Bing. N. C. 58; 2 *Duer on Insurance*, ed. 1846, 120, 221, sec. 27, et seq.

<sup>46</sup> *French v. Read*, 6 Binn. (Pa.) 308; *Rundle v. Moore*, 3 Johns. Cas. (N. Y.) 36; *Leverick v. Meigs*, 1 Cow. (N. Y.) 645; *Fornin v. Oswell*, 3 Camp. 357; *Moore v. Morgue*, Cowp. 579; *Glaser v. Cowie*, 1 Maule & S. 52; *Wilkinson v. Coverdale*, 1 Esp. 74; *Emerigon on Insurance*, Meredith's ed. 1850, c. v, sec. 6, pp. 114, 115; 2 *Duer on Marine Insurance*, ed. 1846, 211, sec. 19, et seq.

<sup>47</sup> *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409; 31 N. W. Rep. 454, per the court.

<sup>48</sup> *Park v. Hammond*, 1 Holt, 81, per Gibbs, C. J. (agent assured).

whatever his belief as to the interests of his principal.<sup>49</sup> So the agent is liable, in case the goods shipped are not fully covered as directed, particular instructions having been given,<sup>50</sup> or where they are not insured to their full value required by the instructions,<sup>51</sup> or in case the agent neglects to cover the premium.<sup>52</sup> So the company's managing agent may be liable to it for instructions affecting an insurance where the instructions prohibiting the risk in question were entered in a book containing a record of the lots and blocks in the city, and in which it was customary to make such memoranda relating to risks, and which entry was noticed by said agent, but through some misapprehension the general nature of the entry disregarded it; the instructions in such case being held sufficient to bind such agent.<sup>53</sup> And agents are liable for the loss where money is sent to them to procure insurance in a good company, or to return the money where such agent procures a policy in a company which is insolvent, and has not complied with a statute requiring a paid-up capital of a certain amount, as a condition precedent to doing business, by any company not organized or incorporated under the state laws.<sup>54</sup> So where agents obtain an insurance on which, by reason of their neglect to follow instructions, they would have been liable for the loss, they have no right to the premium.<sup>55</sup>

**§ 666. Same Subject—Instructions to Cancel.**—It is the duty of the principal's agent when ordered peremptorily to cancel a risk, to exercise reasonable diligence to execute the order, and his neglect to do so renders him liable to the company for a resulting loss, even though he delays from a mistaken view as to the safety of the risk, and the wis-

<sup>49</sup> *Courcier v. Ritter*, 4 Wash. (C. C.) 551 (agent assurer); *Shaw v. Aetna Ins. Co.*, 49 Mo. 578 (agent assured); *Glaser v. Corrie*, 1 Maule & S. 52 (agent assured); *Comber v. Anderson*, 1 Camp. 52 (agent assured); 2 Kent's Commentaries, 5th ed., 618.

<sup>50</sup> *Park v. Hammond*, 4 Camp. 344; 1 Holt, 80; 6 Taunt. 493.

<sup>51</sup> *Ela v. French*, 11 N. H. 356.

<sup>52</sup> *Glaser v. Corrie*, 1 Maule & S. 52.

<sup>53</sup> *Hanover F. Ins. Co. v. Ames*, 39 Minn. 150; 39 N. W. Rep. 300.

<sup>54</sup> *Morton v. Hart*, 88 Tenn. 427; 12 S. W. Rep. 1026.

<sup>55</sup> *Storer v. Eaton*, 50 Me. 219. See *Keane v. Branden*, 12 La. Ann. 20.

dom of canceling the same, or from a belief that the company was misinformed.<sup>56</sup> And this conforms to the rule in other cases of agency, which is, that an agent cannot shield himself, in case he disregards his principal's instructions, by proof that he intended to benefit such principal.<sup>57</sup> And where an agent is directed to cancel a policy, and neglects, within a reasonable time, to comply with such order, he is liable to the company for a loss arising on the policy, where several days elapse during which the order could have been complied with.<sup>58</sup> Again, where the company's agent, being instructed to cancel a risk, notifies a broker whose agency has terminated with procuring the policy, and requests him to cancel, and the company, in consequence, sustains a loss, the agent, by failing to cancel in accordance with the provisions of the policy, becomes liable to the company for such neglect, even though the notice to the broker was in pursuance of a local custom.<sup>59</sup>

**§ 667. Where Agent's Orders Vest Him With a Discretion.**—In case the election to insure or not to insure is left exclusively to the agent's discretion, he is only responsible for his good faith and the honest exercise of his judgment, if he does not effect a policy. Although if he does elect to insure, the same diligence and skill in procuring an insurance seems to be required of him as would have been, had the order been positive.<sup>60</sup> So in case of an agent of the insurer, if the order vests him with an absolute discretion, only good faith and an honest exercise of his judgment is required.<sup>61</sup> There are other cases in which a certain amount of discretion must necessarily be exercised, although instructions are given. These will be noted hereafter.

<sup>56</sup> *Washington F. & M. Ins. Co. v. Cheseboro*, 35 Fed. Rep. 477.

<sup>57</sup> *Rechtsherd v. Accommodation Bank etc.*, 47 Mo. 181.

<sup>58</sup> *Phoenix Ins. Co. v. Frissell*, 142 Mass. 513.

<sup>59</sup> *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290; *Grace v. American Cent. Ins. Co.*, 109 U. S. 278.

<sup>60</sup> 2 *Duer on Marine Insurance*, ed. 1846, 227, sec. 31. See *Id.*, sec. 34, et seq., and notes. As to duty to insure, see *Comber v. Anderson*, 1 Camp. 523, 525.

<sup>61</sup> *Courcier v. Ritter*, 4 Wash. (C. C.) 551.

§ 668. **When Agent is Excused for Noncompliance with Instructions.**—It is the principal's duty to make his instructions clear, explicit, and positive. If they are lacking in any of these requirements, or if they are ambiguous or obscure, and will bear different interpretations, the agent is not liable if he honestly and in good faith, although erroneously, adopts such a construction thereof as the words fairly and reasonably import, notwithstanding a critical examination would discover the correct meaning to be different.<sup>62</sup> It is also held in cases of agents generally, that a circumstantial variation in the execution of an authority is not material; that the variance must be material and substantial.<sup>63</sup> And, since parties cannot enforce a contract of insurance which is illegal or against public policy,<sup>64</sup> it would necessarily follow that instructions to effect such insurances need not be complied with. Nor is any agent obligated to do an illegal or immoral act, no matter what his instructions may be, and the subject not being insurable, there is no liability for neglect to insure;<sup>65</sup> although it seems that if the order to insure is only partially illegal as to the risks, the agent must be held liable, so far as the policy would have been valid, in case he neglects to insure.<sup>66</sup> So a certain discretion must necessarily be exercised by the agent where the prac-

\* *Winne v. Niagara F. Ins. Co.*, 91 N. Y. 185; *De Tastet v. Croussilat*, 2 Wash. (C. C.) 136, per Washington, J.; *Rundle v. Moore*, 3 Johns. Cas. (N. Y.) 36. For rule as to agents in general, see *Foster v. Rockwell*, 104 Mass. 107; *Vianna v. Barclay*, 3 Cow. (N. Y.) 281; *Marsh v. Whitmore*, 21 Wall. (U. S.) 178.

\* *Ewell's Evans on Agency*, 234, side p. 168; citing *Parker v. Kett*, 1 Salk. 95, per Holt, C. J.; *Story on Agency*, sec. 165.

\* *Russell v. De Grand*, 15 Mass. 35; *Pond v. Smith*, 4 Conn. 217; *Brandon v. Curling*, 4 East, 410; 1 *Smith* (61 Pa. St.), 85; *Ex parte Lee*, 13 Ves. Jr. 64; *Gamba v. Le Mesurier*, 4 East, 407.

\* *Webster v. De Tastet*, 7 Term Rep. 157; *Glaser v. Cowie*, 1 Maule & S. 52; *Story on Agency*, sec. 195; *Armstrong v. Toler*, 11 Wheat. (U. S.) 258, 268; *Maydew v. Forester*, 5 Taunt. 615.

\* *Glaser v. Cowie*, 1 Maule & S. 52. "A broker who has neglected to insure the premium according to the directions of his principal cannot set up as a defense that he was directed also to insure against British capture; for that is not a crime so as to render the policy absolutely void for illegality, though it avoids it pro tanto": 1 *Arnould on Marine Insurance*, Perkins' ed. 1850, 163. See 1 *Id.*, MacLachlan's ed. 1887, 178.



tice as to like insurances is unsettled, or there is no known or certain usage, and the law is uncertain or disputed, for an agent is not liable to his principal for a mistake as to a doubtful matter of law.<sup>67</sup> So in case of agents generally, the law excuses a strict compliance with instructions where some special or unexpected emergency or necessity would render such compliance impracticable or impossible, or where it would defeat the very purpose intended to be accomplished. Here, again, the rule as to the exercise of a sound and honest discretion applies.<sup>68</sup> But if it is impracticable to follow instructions, the agent should at once notify the principal.<sup>69</sup> Again, a broker receiving written instructions, and executing them, is not liable for failure to follow prior oral instructions which differ therefrom, since it may be reasonably supposed that so much of the oral instructions as differ from the written ones were changed.<sup>70</sup> So there are cases where an agent may exceed his authority, and the insurance will not be wholly void, as where he exceeds the limit as to the premium. Emerigon says: "The order is not the less well executed, though the agent should have paid or promised to pay a higher premium than that prescribed to him; he is responsible for the excess only."<sup>71</sup> And though the agent may

<sup>67</sup> See *Mechanics' Bank v. Merchants' Bank*, 6 Met. (Mass.) 13, per Shaw, C. J.; *Campbell v. Rickards*, 5 Barn. & Adol. 844, 845, per Lord Denman; *Park v. Hammond*, 1 Holt. 81; 4 Camp. 344; 2 Duer on Insurance, ed. 1840, 213, sec. 21; 1 Arnould on Marine Insurance, Perkins' ed., 156, side p. 155; *Rickards v. Murdock*, 10 Barn. & C. 527.

<sup>68</sup> *Lotard v. Graves*, 3 Caines (N. Y.), 228; *Greenleaf v. Moody*, 13 Allen (Mass.), 363.

<sup>69</sup> *Callander v. Oelrich*, 5 Bing. N. C. 58; *De Tastet v. Crousillat*, 2 Wash. (C. C.) 132. "If the agent finds it impracticable to effect an insurance according to the terms of his instructions, it is his duty to give immediate notice of his failure to his principal, precisely for the same reasons that impose a similar duty on the agent when he wholly declines the execution of an order to insure": 2 Duer on Insurance, ed. 1846, 221, sec. 27. See, also, 1 Arnould on Marine Insurance, Perkins' ed., 151, 152.

<sup>70</sup> *Fornin v. Oswell*, 3 Camp. 357.

<sup>71</sup> Emerigon on Insurance, Meredith's ed. 1850, c. v, sec. 6, p. 115. "If the excess may be readily ascertained and separated, it is valid so far as it is embraced by his authority, and void only as to the residue": 2 Duer on Insurance, ed. 1846, 235, et seq.; citing 2 Kent's Commentaries, 5th ed., pp. 618, 619; *Story on Agency*, 2d ed., secs. 103, 169; *Livermore on Agency*, 101, 102.

have exceeded his authority, if he informs and explains to the principal what has been done, the latter is supposed to have approved the conduct of the former, although he has exceeded his instructions, where he neglects to dissent within a reasonable time, for this constitutes a ratification of his acts.<sup>72</sup>

§ 669. **Duty to Insure.**—A duty to insure may arise in case of an acceptance of express orders, from general usage, from a habit of dealing, from the acceptance of a bill of lading, and from the relations of the parties. A general agent may be obligated to insure in certain cases, and a voluntary agent may be liable for not effecting a policy under certain circumstances.<sup>73</sup> In the oft-quoted opinion of Mr. Justice Buller<sup>73a</sup> it is said that there are three instances in which an order to insure must be obeyed: "First, where a merchant abroad has effects in the hands of his correspondent here, he has a right to expect that he will obey an order to insure, because he is entitled to call the money out of the other's hands when and in what manner he pleases. The second class of cases is, where the merchant abroad has no effects in the hands of his correspondent, yet if the course of dealing between them is such that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will still be obeyed, unless the latter give him notice to discontinue their course of dealing. Thirdly, if the merchant abroad send bills of lading to his correspondent

<sup>72</sup> Emerigon on Insurance, Meredith's ed. 1850, c. v, sec. 6, p. 117. See as to general rule, *Dana v. Turley*, 38 Minn. 106; 35 N. W. Rep. 860; *Williams v. Merritt*, 23 Ill. 623; *Clement v. Jones*, 12 Mass. 60; *Armstrong v. Gilchrist*, 2 Johns. Cas. (N. Y.) 431; *Johnson v. Wingate*, 29 Me. 404.

<sup>73</sup> See sec. 680, herein.

<sup>73a</sup> In *Wallace v. Telfair*, 2 Term. Rep. 188 n., and in *Smith v. Lascelles*, 2 Term Rep. 188, Ashurst and Grose, JJ., concurring. See 1 *Marshall on Insurance*, ed. 1810, 297; *Ewell's Evans on Agency*, 301; 1 *Arnould on Marine Insurance*, Perkins' ed., 143; 2 *Parsons on Marine Insurance*, ed. 1868, 500, note; 2 *Phillips on Insurance*, 3d ed., 549, sec. 1888; 2 *Duer on Marine Insurance*, ed. 1846, 121; *Randolph v. Ware*, 3 Cranch (U. S.), 503; *French v. Reed*, 6 Blinn. (Pa.) 308; *De Tastet v. Crousillat*, 2 Wash. (C. C.) 136; *Morris v. Summerl*, 2 Wash. (C. C.) 203.

here, he may engraft on them an order to insure, as the implied condition on which the bills of lading shall be accepted, which the other must obey if he accepts them, for it is one entire transaction.”<sup>74</sup> So an agent may be bound to insure where the general usage of merchants, or even of that particular trade to which his agency relates, requires him to do so.<sup>75</sup> There are exceptions, however, to these rules. Thus, an agent cannot be bound to effect an insurance where unforeseen circumstances arise after the order is given which could not then have been known or anticipated, and under which, instead of the principal’s obtaining an indemnity, the execution of the order would result to his prejudice or loss. Duer inclines to a rule less broad in its application, and says: “Where it is absolutely certain that the principal, with a knowledge of the facts, would forbid the insurance, the agent is doubtless released from his obligation to effect it”; and adds: “It must always be hazardous for an agent whose orders are positive to act on his own speculative views of the interests of his employer. The unexpected magnitude of a required advance may excuse a noncompliance, but where there exists a possible doubt as to the interests or wishes of the principal, the safest course for an agent who has funds in his hands is to obey.”<sup>76</sup> An agent without funds of the principal is not under obligations to insure, unless a previous course of dealing warrants the implication that credit will be given for the premium by the broker, or that he will advance it himself or use his own credit.<sup>77</sup> So where the agent has no funds, and has just cause to believe that the principal is insolvent, a qualification of the rule as to a previous course of dealing must be made, for if an agent has been accustomed to insure on certain

<sup>74</sup> “These rules are evidently reasonable and just, and . . . they have now passed into the general law of commercial Europe, . . . yet they are not to be admitted as universally true. They are subject to some exceptions. . . . The order to insure may be safely declined in all cases where no injury can possibly result to the principal”: 2 Duer on Marine Insurance, ed. 1846, 122, sec. 15.

<sup>75</sup> See Story on Agency, secs. 60, 190, 199; *Kingston v. Nelson*, 4 Wash. (C. C.) 315; *French v. Reed*, 6 Binn. (Pa.) 308.

<sup>76</sup> 2 Duer on Marine Insurance, ed. 1846, 122, sec. 15. See sec. 668 herein.

<sup>77</sup> 2 Phillips on Insurance, 3d ed., 548, sec. 1887.

terms, and circumstances arise, of which the principal has knowledge, which would necessitate a much higher rate premium, as in case of war, the principal has no right to expect that the insurance will be effected unless the necessary funds are remitted.<sup>78</sup> An agent obligated to insure must effect insurance within a reasonable time,<sup>79</sup> and must make a reasonable effort to execute the order,<sup>80</sup> and a direction by a principal to his agent to effect a policy is not satisfied by a parol contract for insurance.<sup>81</sup> In such case he is liable for the loss, and if the contract be valid, he may sue thereon in the principal's name, and have it assigned to him.<sup>82</sup> Where the order is general, if an agent acts in the usual manner, and does what is usual at the usual place to effect the insurance, that is sufficient.<sup>83</sup> But it is incumbent on a broker to effect insurance with underwriters of reputed responsibility and good credit.<sup>84</sup> If an agent pretend that he has effected a policy and none has been effected, trover will lie against him for it, and, upon proof of loss, recovery may be had to the same amount which assured would have been entitled to recover against the underwriters had a policy been effected.<sup>85</sup> Thus, if an agent takes his principal's money, expressly agreeing to obtain insurance, and unjustifiably fails to secure the same, or make an effort in that direction, he assumes the risk, and, in case of loss, becomes liable to pay as much of the same as would have been covered by the contract of insurance for which the principal has paid, had insurance been effected as directed.<sup>86</sup> If an agent, acting under general orders, undertakes to effect a particular insurance, he is obligated to

<sup>78</sup> 2 Duer on Marine Insurance, ed. 1846, 122, et seq., secs. 15-17. These cases, as will be observed, turn upon the question of funds and the obligation of the agent to make advances.

<sup>79</sup> Turpin v. Bilton, 5 Man. & G. 455.

<sup>80</sup> Smith v. Lascelles, 2 Term Rep. 187.

<sup>81</sup> Manny v. Dunlap, 1 Woolw. (U. S.) 372.

<sup>82</sup> Manny v. Dunlap, 1 Woolw. (U. S.) 372.

<sup>83</sup> Smith v. Cologan, 2 Term Rep. 118, note.

<sup>84</sup> 2 Phillips on Insurance, 3d ed., 553, sec. 1895.

<sup>85</sup> 1 Marshall on Insurance, ed. 1810, \*300, \*303, reporting Harding v. Carter.

<sup>86</sup> Lindsay v. Pettigrew, 5 S. Dak. 500, 503; 59 N. W. Rep. 726, per Fuller, J.; citing Mechem on Agency, 475; 3 Sutherland on Damages, 9; Perkins v. Insurance Co., 4 Cow. (N. Y.) 645; Thorne v. Deas, 4

do so,<sup>87</sup> and an agent, under a general agreement to execute all his principal's orders, must execute each order received, the obligation being an express contract.<sup>88</sup> So an agreement, based upon a valuable consideration, to procure insurance for another obligates the party so agreeing, and he is liable if he neglect to perform the obligation.<sup>89</sup> And it is obligatory on a broker to effect insurance at any rate of premium where the order to insure is absolute, provided there are sufficient funds in his hands, or, if the course of dealing warrants, to credit or advance the premiums to the necessary amount.<sup>90</sup> In the absence of a general usage or custom a promise by a factor to write to his principal to get insurance effected does not bind the latter to insure.<sup>91</sup> Whether an agent is obligated to extend his efforts to execute an order outside a particular place or vicinity must, to some extent, depend upon the nature and character of his orders, in relation to the terms and the risk, upon usage, the course of business, and the facilities of communication outside. Thus, in England it is held that if the usage of a particular place is not to go outside for insurance, no obligation rests upon the broker to do so.<sup>92</sup> But in the United States, where the agents were directed to procure an insurance to a large amount on a cargo, and the agents were unable to effect an insurance in the place, which was Boston, and directed their correspondents in New York to insure, but limited the premium, in consequence of which only a partial insurance was effected, and the agents were sued for the full loss for which the underwriters would have been liable had a policy been effected, the defendants were held not liable, on the ground that the agent's duty did not require them to extend their efforts beyond Boston, and that their further acts were voluntary,

*Johns*. (N. Y.) 84; *Shoenfield v. Fleisher*, 73 Ill. 404; *Beardsley v. Davis*, 52 Barb. (N. Y.) 159; *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 169; *Morris v. Summerl*, 2 Wash. (C. C.) 203; *Fed. Cas.* 9, 837.

" *Thorne v. Deas*, 4 Johns. (N. Y.) 84.

" *Delaney v. Stoddart*, 1 Term Rep. 22; *Tickel v. Short*, 2 Ves. Sr. 239; *Ela v. French*, 11 N. H. 357; *Story on Agency*, 2d ed., sec. 190.

" *Ela v. French*, 11 N. H. 357.

" 2 Phillips on Insurance, 3d ed., 553, sec. 1898.

" *Randolph v. Ware*, 3 Cranch (U. S.), 503.

" *Smith v. Cologan*, 2 Term Rep. 188, n.

and that they were not responsible, unless a positive loss had been occasioned by such efforts.<sup>93</sup>

**§ 670. Agent's Duty—More Advantageous Terms.**—The fact that an agent, acting under general orders, could have procured more advantageous terms by placing the insurance with a private underwriter than with the corporation where the policy was effected, both insurers being in the same place, and no special directions as to the party with whom the insurance should be placed had been given, is held in an English case not to have rendered the agent liable.<sup>94</sup> This case is, however, denied as an authority by Duer, on the ground that good faith and reasonable diligence necessitates that the agent should make the insurance on the best terms he is able to obtain, and that it is gross negligence on the part of the agent not to know what the different companies where he resides propose by their printed policies to do; that when it is known to the agent that the terms of one office are much more beneficial than those of another, and that both are of equal credit and standing, the agent has no discretion to elect between the underwriters, but must select the one which offers the most favorable terms.<sup>95</sup> If it be assumed that the agent is fully acquainted with the terms of all the offices in the place where the insurance is effected, then there is force to Duer's objections, but only good faith and reasonable diligence are exacted of the agent who effects insurance, and the rule applies equally to cases of this character as in others. To exact more, is to go into the possibilities, and a possibility that the agent could have effected the insurance on more favorable terms does not render him liable, nor show any want of good faith.<sup>96</sup> But an agent act-

<sup>93</sup> *Sanchez v. Davenport*, 6 Mass. 258; 1 *Arnould on Marine Insurance*, Perkins' ed., 15, side p. 153; 2 *Phillips on Insurance*, 3d ed., 550, sec. 1890; 2 *Duer on Insurance*, ed. 1846, 240, et seq., sec. 40, et seq.

<sup>94</sup> *Moore v. Morgue*, 2 Ccwp. 479.

<sup>95</sup> 2 *Duer on Marine Insurance*, ed. 1846, 230, et seq. But see *Coomber v. Anderson*, 1 Camp. 523 (although it seems in this case that the principal had adopted the policy), per Lord Ellenborough: 2 *Phillips on Insurance*, 3d ed., 553, sec. 1895, et seq.

<sup>96</sup> See *Story on Agency*, 2d ed., sec. 191.

ing under general orders is not liable because better terms could have been obtained in another place.<sup>97</sup>

**§ 671. Where Agent Departs From Usage or Usual Form of the Policy.**—An agent is bound to have knowledge of existing usages of the place where he does business, and must conform thereto.<sup>98</sup> It is also incumbent upon the broker that he should, in executing an order, insert in the policy, without directions therefor, all such clauses and risks as are ordinarily and customarily inserted in like policies and upon like property, and which are usual and proper for the protection of the property on the intended voyage, and if he departs from usage, or inserts unusual clauses, or omits to insert the usual clause or clauses which it has been the invariable practice to insert, whereby a loss arises to his principal, he is liable.<sup>99</sup> And where the risks and terms are not specified in the order to insure, the agent is presumed to effect insurance in the customary way at the place it is to made, dependent upon the property and voyage.<sup>100</sup> So if an agent, acting in good faith and without negligence or breach of orders, effects an insurance which contains the usual clause "free from average, unless general," he is not liable where the policy does not cover the loss, although the insurance might have been effected without that exception.<sup>101</sup> And a broker is liable who, being instructed to effect an insurance "at and from," neglected to insert a modifying clause which it was the invariable usage to insert in all like policies, where by this neglect a recovery was defeated.<sup>102</sup> So where the effect of a clause as to the terminus a quo is well settled in law, an insurance broker is bound to be acquainted with its meaning, and if he neglects, contrary to his instructions, to have such clause properly changed so as to cover the risk, he

<sup>97</sup> *Smith v. Cologan*, 2 Term Rep. 188, n.

<sup>98</sup> *Mallough v. Barber*, 4 Camp. 150.

<sup>99</sup> *Thompson v. Read*, 12 Serg. & R. (Pa.) 440; *Mallough v. Barber*, 4 Camp. 150; *Story on Agency*, sec. 191; *Park v. Hammond*, Holt N. P. 80; 4 Camp. 144; 6 Taunt. 295; 1 Arnould on Marine Insurance, Perkins' ed., 156, \*155; 1 Id., MacLachlan's ed. 1887, 176, 177.

<sup>100</sup> *Chapman v. Walton*, 10 Bing. 57.

<sup>101</sup> *Moore v. Morgue*, Cowp. 479; *Comber v. Anderson*, 1 Camp. 523.

<sup>102</sup> *Mallough v. Barber*, 4 Camp. 150.

is liable for negligence.<sup>103</sup> And if an agent, acting under general orders, departs from the usual form of the policy, and inserts words of limitation, which operate to discharge the underwriters, he cannot recover his premium from the principal.<sup>104</sup>

§ 672. **Duty as to Premium.**—If an agent accepts and acts under orders to effect an insurance without restriction as to the premium, and limits himself or the broker to too small a premium, and so prevents or is unable to obtain the insurance, he is liable for the consequent loss to his principal.<sup>105</sup> Exceptions, however, to this rule would exist in cases where the agent is not obligated to execute the order, or is excused therefrom. So, also, where he has no funds in his hands or not sufficient funds, and no duty rests upon him to advance the premium.<sup>106</sup> But where a duty devolves upon him so to do, an agent's negligence in paying premium, whereby the risk does not attach, renders him liable.<sup>107</sup>

§ 673. **Duty as to Subagent.**—An agent must give the subagent proper instructions relative to the business intrusted to his care.<sup>108</sup> And if an insurance broker is requested to employ another broker to obtain insurance, and neglects to convey material information to the second broker, by reason of which the insurance is invalidated, the first broker is liable.<sup>109</sup> It is also held that it is the duty of a subagent, who is subject to the authority of a superior agent acting for the company, to obey such orders as the latter may give him relative to the business of the company, and the risks taken by him. So where a state agent of a foreign company, with authority therefor, di-

<sup>103</sup> *Park v. Hammond*, Holt N. P. 80; 4 Camp. 144; 6 Taunt. 295; 2 Duer on Insurance, ed. 1846, 206, sec. 17; 210, sec. 19; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 157, \*156; 1 Id., MacLachlan's ed. 1887, 176, et seq.

<sup>104</sup> *Thompson v. Reed*, 12 Serg. & R. (Pa.) 440.

<sup>105</sup> *Wallace v. Telfair*, 2 Term Rep. 188, n.; *Delaney v. Stoddart*, 1 Term Rep. 22; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 154, \*153; 1 Id., MacLachlan's ed. 1887, 173.

<sup>106</sup> 2 Duer on Marine Insurance, ed. 1846, 234.

<sup>107</sup> *Perkins v. Washington Ins. Co.*, 4 Cow. (N. Y.) 645.

<sup>108</sup> *Foster v. Preston*, 8 Cow. (N. Y.) 198.

<sup>109</sup> *Seller v. Work*, 1 Marshall on Insurance, 299.



rects a local agent to cancel a risk taken by him, and he neglects to comply with the order, the company may recover from him a loss which it is compelled to pay by reason of the policy not being canceled.<sup>110</sup>

§ 674. **Degree of Skill Required from Agents.**—The degree of skill required of an agent must depend greatly upon the character of his business or his situation, upon whether he is a skilled agent or not, and also upon the degree of skill which he assumes to possess. Whether an agent to effect insurance is liable to his principal for want of requisite skill is a question dependent largely upon whether his business is within or outside the line of his employment as agent. If he holds himself out to the world as possessing certain skill, or if his business is such as to carry with it an implication that he possesses particular skill in effecting insurances, as in case of an insurance broker, his principal is justified in relying upon the knowledge which he professes to possess, and he is bound to exercise the skill and to use the knowledge which the business requires and which persons of average capacity engaged therein possess. But if the agent has no experience or skill in the business, and he is known not to possess it, his employment necessitates only the exercise of good faith and diligence, and he is bound to a reasonable exercise only of such skill as he possesses.<sup>111</sup> An insurance broker does not, however, contract that he will exercise an extraordinary degree of skill, but only a reasonable and ordinary proportion of skill.<sup>112</sup> But a mercantile agent or insurance broker acting as such in effecting

<sup>110</sup> *Phoenix Ins. Co. v. Pratt*, 36 Minn. 409; 31 N. W. Rep. 454.

<sup>111</sup> See as to general rule, 2 Phillips on Insurance, 3d ed., 547, sec. 1894; Edwards on Bailments, sec. 77, et seq.; *Howards v. Grover*, 23 Me. 97; 48 Am. Dec. 478; Story on Bailments, 3d ed., secs. 12-15, 435; *Glaser v. Cowie*, 1 Maule & S. 52; *Dwell's Evans on Agency*, 327, 332; *Cheriot v. Brooks*, 1 Johns. (N. Y.) 364; *Beardslee v. Richardson*, 11 Wend. (N. Y.) 25; 25 Am. Dec. 596; *Madison v. Townsley*, 12 Mart. (Lea) 365; *Shields v. Blackburne*, 1 H. Black. 158; *Chandler v. Hoyle*, 58 Ill. 46; Story on Agency, sec. 183; 1 Arnould on Marine Insurance, Perkins' ed. 1850, 149-63; 1 Id., MacLachlan's ed. 1887, 166, et seq.; *Angell on Carriers*, secs. 10, 17, 20; *Stevens v. Walker*, 55 Ill. 151; *Robinson v. Illinois etc. Co.*, 30 Iowa, 401.

<sup>112</sup> *Chapman v. Walton*, 10 Bing. 57.

insurances is bound to possess knowledge as to the proper mode of framing a policy and the settled legal effect and construction of well-known clauses. He is bound to be informed as to existent and well-known usages, is conclusively presumed to be familiar with the formal and ordinary details necessary to effect the insurance and make the policy valid, and must exercise such reasonable and ordinary care, skill, and diligence as the principal being a person of common prudence and business knowledge would have reasonably exercised under an effort to execute the order. The measure of diligence required is not determined by that which the agent would employ in his own affairs, but by that which is ordinarily possessed and employed by persons engaged in like business. He is also responsible for want of good faith and for errors of ignorance or negligence.<sup>113</sup> But a broker is not liable for damages consequential upon his mistake as to the law where acting bona fide he makes a reasonable mistake upon a doubtful point of law.<sup>114</sup> Where an agent with instructions from a foreign correspondent to insure was informed that the goods were to be laden at a port other than that where the risk was to commence and he neglected to have the printed form "at and from," etc., modified, in consequence of which the underwriter was discharged, the agent was held responsible, the court declaring that an agent undertaking to insure for those abroad was bound to be acquainted with the proper mode of effecting it.<sup>115</sup>

**675. Duty to Effect Other Insurance in Case of Insurer's Insolvency.**—Emerigon declares that in case of

<sup>113</sup> *Chapman v. Walton*, 10 Bing. 63, per Tindall, C. J.; *Mallough v. Barber*, 4 Camp. 150; *Park v. Hammond*, 4 Camp. 344; *Turpin v. Bliton*, 5 Man. & G. 455; *Thompson v. Reed*, 12 Serg. & R. (Pa.) 440. See *Mechanics' Bank v. Merchants' Bank*, 6 Met. (Mass.) 13, per Shaw, C. J.; 1 *Arnould on Marine Insurance*, Perkins' ed. 1850, 153, 154; 1 *Id.*, *MacLachlan's* ed. 1887, 173, et seq.; 2 *Duer on Marine Insurance*, ed. 1846, 184, et seq.

<sup>114</sup> *Park v. Hammond*, 1 Holt, 80; 4 Camp. 344; 6 Taunt. 295; *Mechanics' Bank v. Baltimore & Merchants' Bank*, 6 Met. (Mass.) 13; *Pitt v. Falden*, 4 Burr. 2060.

<sup>115</sup> *Park v. Hammond*, 4 Camp. 314. In the report of this case in 6 Taunt. 495, the clause "at and from" is modified to accord with the instructions; probably an error. As to the degree of diligence in case of voluntary agents, see sec. 679 herein.

the failure of the insurer that Valin is of the opinion that the agent must wait for new orders to effect insurance anew, but that new orders are not necessary to effect reinsurance at the expense of the insolvent himself, and sets forth the form of proceeding by virtue of which the reinsurance was effected and the first insurance kept alive in France.<sup>116</sup> Parsons says if it is the agent's "duty to effect insurance, and he does this, and the insurers become notoriously insolvent, it would seem both on reason and on authority that it is his duty to effect other insurance."<sup>117</sup> Exactly how far this rule would apply in the United States is difficult to determine. Parsons cites no authorities here, but refers to Duer's discussion of the question. This last-named author says substantially that it is clear that in the United States, where the policies provide against other or prior insurance, an agent would not be authorized to perform an act which would invalidate per se the first policy, for that is in force until annulled by the consent of the parties, and in case the insurance is effected by an agent, the insolvency of the insurers could not warrant the agent, for the above reason, in procuring another insurance should the contract have been dissolved or rescinded, and the agency still continues, and by virtue of the nature and scope of his authority, or by reason of the terms of his instructions, he has power to reinsure; then there may be reason in a rule which would require him to do so. He cites no cases, however, in this country.<sup>118</sup> In cases where the agency is merely to procure insurance, and determines by the very act of effecting the policy, no duty could reasonably be held to rest upon the agent to procure other insurance in case of insolvency of the assured, and if he should do so, it would be a mere voluntary act. Where, however, the agency is a continuing one, the question is more difficult. Insurance is intended as an indemnity, and the question arises

<sup>116</sup> Emerigon on Insurance, Meredith's ed. 1850, c. v, sec. 7, p. 118; c. viii, sec. 16, p. 207. He says: "Our merchants acting as agents are too attentive to the interests of their principals ever to neglect this proceeding, which requires the greatest celerity": *Id.* 118.

<sup>117</sup> 2 Parsons on Marine Insurance, ed. 1868, 428.

<sup>118</sup> See 2 Duer on Insurance, ed. 1846, 193, sec. 8. Examine *Id.* 188-98.

whether an agent has performed his entire duty in relation to that particular insurance by effecting that policy. Does the fact that it results by the insurer's insolvency in only being a partial indemnity, or perhaps none at all, affect the issue? The condition as to other or prior insurance could be no serious objection as to the second insurance, and even if the first policy could not be rescinded, would not the agent be obligated to act in the interests of his principal, and secure by a new contract an indemnity which shall protect his principal, although at a loss of such partial indemnity as the first policy might afford? Surely, an ordinarily prudent man would do so, and would not good faith require, in such case, the same degree of reasonable diligence and ordinary prudence on the part of the agent? It would seem so, especially if the insurer was notoriously insolvent. The nature of the agent's instructions must also have some bearing upon the case. We would suggest, therefore, that if the agent's authority be a continuing one, he is bound, in case the insurer is notoriously insolvent, to use reasonable diligence to procure other insurance, provided that in the exercise of good faith and a sound and honest discretion, such as business men would ordinarily be expected to use, it would appear to be for his principal's interests to do so.

**§ 676. Duty of Agent to Settle Loss.**—The loss is a debt due the principal and not to the broker, but where the broker is intrusted with the policy to obtain an adjustment of the loss, he is bound to the use of reasonable diligence in effecting a speedy adjustment and collection of the amount due therefor, and must without delay pay the amount collected over to the assured.<sup>119</sup> Where the policy expressly provides for the payment of the loss to the agent, he may adjust the loss,<sup>120</sup> and the agent who is the nominal assured may adjust a loss where he has the policy in his possession.<sup>121</sup> So an agent who retains the policy with his principal's consent thereby has his agency continued,

<sup>119</sup> *Bousfield v. Cresswell*, 2 Camp. 544, per Lord Ellenborough; *Run-  
dle v. Moore*, 3 Johns. Cas. (N. Y.) 36.

<sup>120</sup> *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191.

<sup>121</sup> *Reed v. Pacific Ins. Co.*, 1 Met. (Mass.) 166.

and is substituted for him, and it is then incumbent upon him, acting generally upon the principal's advice, to do and perform such acts as the protection of the rights and interests of his principal demand, in all matters pertaining to the contract, and he should demand payment of the underwriter.<sup>122</sup> And if such agent after the loss neglects to make demand with necessary diligence for the payment of the loss, he is liable.<sup>123</sup> So if the agent, through negligence, mistakes his instructions, and, contrary thereto, effects an adjustment and settlement of the loss, he is liable;<sup>124</sup> and where an agent employed to settle a total loss, through mistake or negligence settled for an average loss of twenty per cent, he was held liable for the whole amount.<sup>125</sup> So a broker may be liable for not promptly collecting losses under the policy.<sup>126</sup> But a principal who looks to the subagent for recovery of the loss, where the same has been paid into such subagent's hands by the underwriter, cannot thereafter recover from the agent who employed the subagent.<sup>127</sup>

**§ 677. Duty and Liability as to Payment of Loss—Agent.**—In England an adjustment and settlement by the broker makes him, and not the underwriter, liable to the assured for the loss, especially where the latter has erased the underwriter's name from the policy in conformity with a usage so to do, and the assured knows of such usage.<sup>128</sup> In regard to the payment of the loss, many questions have arisen in England, owing to the system of credits existing there between the broker, the assured, and the underwriter, which could not well

<sup>122</sup> See *Chesapeake Ins. Co. v. Stark*, 6 Cranch (U. S.), 268; *Bonsfield v. Cresswell*, 2 Camp. 545; *Goodson v. Brocke*, 4 Camp. 163; *Todd v. Reed*, 4 Barn. & Ald. 210; *Power v. Butcher*, 10 Barn. & C. 328; 5 Man. & R. 327.

<sup>123</sup> *Emerigon on Insurance*, Meredith's ed. 1850, c. v, sec. 7, p. 118.

<sup>124</sup> *Rundle v. Moore*, 3 Johns. Cas. (N. Y.) 36.

<sup>125</sup> *Rundle v. Moore*, 3 Johns. Cas. (N. Y.) 36.

<sup>126</sup> *Bonsfield v. Cresswell*, 2 Camp. 544.

<sup>127</sup> *Smith v. Cologan*, 2 Term Rep. 188, n, per Buller, J.

<sup>128</sup> See *Andrew v. Robinson*, 3 Camp. 544; *Todd v. Reid*, 4 Barn. & Ald. 211; *Bartlett v. Pentland*, 10 Barn. & C. 769; *Scott v. Irving*, 1 Barn. & Ald. 605; *Russell v. Bangley*, 4 Barn. & Ald. 401; *Bowne v. Nelson*, 1 Calnes (N. Y.), 489.

arise here. The following cases are, however, important: Where the agent who effected the insurance is in possession of the policy, he may receive payment of the loss and discharge the assurer.<sup>129</sup> And payment to the agent who has the policy in his possession is payment to the principal, where it is actually paid in cash, and is specific; that is, intended to cover the particular claim due under the policy, for the underwriters cannot set off a debt of the agents due him against the amount due from him to his principal under the policy.<sup>130</sup> But an agent to receive payment of the loss must receive actual cash; credit of the amount does not discharge the underwriter.<sup>131</sup> But where the payment to the broker is partly cash and partly credit, the payment is good to the extent of the cash received.<sup>132</sup> An agent to collect a loss cannot dispute the title of his principal, for whom he effected the insurance, to the money received from the underwriter, nor may he set up the illegality of the contract.<sup>133</sup> So if the insurance be effected in violation of a statute, or if a policy be effected which is illegal and void, and the underwriters, with full knowledge of the illegality, pay over the moneys due on a loss to the broker, the latter is estopped to set up the illegality as to the assured.<sup>134</sup> The broker, with possession of the policy, has no authority to accept a setoff in payment, except with the consent of the assured, and, if he does, the underwriter is nevertheless liable;<sup>135</sup> nor has a broker any authority to pay a loss to the assured due

<sup>129</sup> *Erick v. Johnson*, 6 Mass. 193; *Wilkinson v. Clay*, 6 Taunt. 110; 4 Camp. 171.

<sup>130</sup> *Russell v. Bangley*, 4 Barn. & Ald. 395; *Erick v. Johnson*, 6 Mass. 193; *Scott v. Irving*, 1 Barn. & Adol. 605; *Jell v. Pratt*, 2 Stark. 69. But see *Stewart v. Aberdeen*, 4 Mees. & W. 228, per Lord Abinger, C. B.

<sup>131</sup> *Russell v. Bangley*, 4 Barn. & Ald. 395; *Todd v. Reid*, 4 Barn. & Ald. 210; *Ovington v. Bell*, 3 Camp. 237; *Scott v. Irving*, 1 Barn. & Adol. 605; *Jell v. Pratt*, 2 Stark. N. P. C. 67; *Bartlett v. Pentland*, 10 Barn. & C. 760.

<sup>132</sup> *Scott v. Irving*, 1 Barn. & Adol. 605.

<sup>133</sup> *Roberts v. Ogilby*, 9 Price, 269; *Dixon v. Hammond*, 2 Barn. & Ald. 310; *Tenant v. Elliott*, 1 Bos. & P. 3.

<sup>134</sup> *Tenant v. Elliott*, 1 Bos. & P. 3; *Farmer v. Russell*, 1 Bos. & P. 298; *Booth v. Hodgson*, 6 Term Rep. 405; *Thompson v. Thomson*, 7 Ves. Jr. 473. But see *Edgar v. Fowler*, 3 East, 333.

<sup>135</sup> *Bartlett v. Pentland*, 10 Barn. & C. 760.

from the underwriter employing him.<sup>136</sup> A part owner effecting insurance for the other part owners may receive the payment of the loss from the broker, and the latter is not liable to the others, notwithstanding a notice not to pay to the part owner insuring from such other part owners.<sup>137</sup> But if the broker receives the amount of a loss, and the policy may by description cover an interest in the goods other than that of the principals, the agent is not liable to pay over the amount to the principal.<sup>138</sup> Again, where the broker settles with the underwriter by credits, and the assured draws a bill payable on the broker, which he accepts, but becomes bankrupt before it becomes due, the underwriter is nevertheless responsible to the assured, since the drawing such bill is not a consent to the settlement on credits.<sup>139</sup> If an agent having authority to adjust and receive payment of the loss settles with the underwriter only by an adjustment of accounts between them, the principal may look to the agent for the amount of the loss, although the latter receives no cash and is estopped to deny on this ground liability to the assured.<sup>140</sup> So where a broker receives payment of the loss on his principal's goods under a policy, he is liable to him for the amount, notwithstanding the goods were described as the property of the agent.<sup>141</sup> In case a *del credere* agent pays the loss where the insurer is insolvent, he has an action against him, and may sue in name of assured where the policy is payable to the latter, or, where the policy is in his own name, for his own benefit, he may sue in his own name.<sup>142</sup> It is held in England that a payment by the broker to the agent of the loss releases the former, where the agent has represented himself as the principal, and this rule has even been carried to the extent that the broker is not liable where part of the money is paid over after knowledge by the broker

<sup>136</sup> *Bell v. Auldjo*, 4 Doug. 48; 4 Dow, 48.

<sup>137</sup> *Roberts v. Ogilby*, 9 Price, 269.

<sup>138</sup> *Armitage v. Winterbottom*, 1 Man. & G. 130.

<sup>139</sup> *Russell v. Bangley*, 4 Barn. & Ald. 395.

<sup>140</sup> *Andrew v. Robinson*, 3 Camp. 189; *Wilkinson v. Clay*, 4 Camp. 171.

<sup>141</sup> *Lidaway v. Todd*, 2 Stark. N. P. C. 400. See *Briggs v. Call*, 5 Met. (Mass.) 514.

<sup>142</sup> 2 Phillips on Insurance, 3d ed., 557, sec. 1905.

of his employer's agency.<sup>143</sup> And where an agent authorizes a broker, in time of war, to procure insurance on property as neutral, this is evidence to the broker that he acted as agent, though the policy was in the agent's own name.<sup>144</sup>

§ 678. *Liability of Agent—Generally.*—If an agent neglects to procure insurance when obligated so to do, or does not follow instructions; or if the policy obtained is void, through the agent's fault, or if it is materially defective for the same reason; or if the principal suffers damage by reason of any mistake or act of omission or commission of the agent, which would constitute a breach of his duty to his principal, he is liable to the latter for any loss he may have sustained thereby.<sup>145</sup> So where an agent was directed to insure, but neglected to do so, he was held liable for the loss in an action on the principal's name, although his interest had ceased by sale prior to the loss.<sup>146</sup> A consignee, who accepts a consignment with orders to insure, is liable if he neglects to execute the order. He cannot accept part and reject the rest; he is bound to insure or give notice of his dissent.<sup>147</sup> And if one merchant is accustomed to insure for another, he is liable if he neglects to do so on receiving orders to insure, and this is so if he departs from the orders in effecting insurance.<sup>148</sup> Since the policy, once effected, is the property of the assured, if the

<sup>143</sup> *Bell v. Jutting*, 1 J. B. Moore, 155. We think this questionable as to the payment after information of the agency and nonliability thereafter.

<sup>144</sup> *Maanss v. Henderson*, 1 East, 335.

<sup>145</sup> "The agent is responsible for his errors in *omittendo* as well as those in *committendo*. If he has omitted to effect the prescribed insurance, he is responsible for the loss not in the light of an insurer, but as a mandatory who has failed in his duty": *Emerigon on Insurance*, Meredith's ed. 1850, c. v, sec. 8, p. 119; *Webster v. De Tastet*, 7 Term Rep. 157; *Pauson v. Watson*, Cowp. 785; *Delaney v. Stoddart*, 1 Term Rep. 22; *Ela v. French*, 11 N. H. 356; *Miner v. Tagert*, 3 Binn. (Pa.) 204; *Strong v. Helgh*, 2 Rob. (La.) 103; *De Tastet v. Crousillat*, 2 Wash. (C. C.) 132; *Story on Agency*, sec. 217.

<sup>146</sup> *Delaney v. Stoddart*, 1 Term Rep. 22.

<sup>147</sup> *Smith v. Lascelles*, 2 Term Rep. 187; *Wallace v. Telfair*, 2 Term Rep. 158, n.

<sup>148</sup> *De Tastet v. Crousillat*, 2 Wash. (C. C.) 132; *Morris v. Summerl*, 2 Wash. (C. C.) 203.



broker induces the belief, on the part of the assured, that his orders have been carried out, when in fact they have not, trover lies, and the broker is estopped to deny the existence of the policy, and is liable for the loss, and he is also liable where the policy is void through his fault.<sup>149</sup> And where an agent acts for a principal, which is an incorporated company with no legal status or responsibility, the presumption attaches that the agent contracted on his own responsibility, and that he is bound as insurer.<sup>150</sup> So if an insurance broker, holding policies which he was employed to obtain by a third party for whom "it may concern," payable to a third party, without notice of any other interest subsequently, and after express notice of the plaintiff's title, surrenders the policy to the insurer upon a compromise, the plaintiff may sue the broker for the policy without any demand, and recover the entire amount from him, irrespective of the compromise.<sup>151</sup> An adjusting agent who procures, by fraud or misrepresentation, the settlement of a loss for less than would otherwise be recovered, is liable for the consequent damage, or the company may be sued.<sup>152</sup> So an action will lie against the company's agent where he misrepresents that certain prohibited articles may be kept, notwithstanding the provisions of the policy.<sup>153</sup> So where an agent employed to procure a life insurance effected a policy as instructed, but thereafter procured its cancellation on the ground of mistake, and the execution of another policy for a much less amount, it was held that he was liable as insurer for the amount of the original insurance, less the premium.<sup>154</sup> So the adjusting

<sup>149</sup> *Harding v. Carter*, cited in 1 *Marshall on Insurance*, ed. 1810, 303; 1 *Arnould on Marine Insurance*, Perkins' ed., 139, sec. 70; 2 *Phillips on Insurance*, 3d ed., 551, sec. 1892. Lord Mansfield said that the defendants must be considered the actual insurers, and liable for the loss: *De laney v. Stoddart*, 1 Term Rep. 22, per Buller, J.; *Ela v. French*, 11 N. H. 356; *Maydew v. Forrester*, 4 Taunt. 615; *Strong v. Heigh*, 2 Rob. (La.) 103; *Turpin v. Bilton*, 5 Man. & G. 455; *Webster v. De Tastet*, 7 Term Rep. 157.

<sup>150</sup> *Booth v. Wonderly*, 36 N. J. 250. See *Furnwall v. Coomlus*, 5 Man. & G. 736.

<sup>151</sup> *Sharp v. Whipple*, 1 Bosw. (N. Y.) 537.

<sup>152</sup> *Home Ins. Co. v. Howard*, 111 Ind. 544; 13 N. E. Rep. 103.

<sup>153</sup> *Kroeger v. Pitcairn*, 101 Pa. St. 311; 47 Am. Rep. 718.

<sup>154</sup> *Gray v. Murray*, 3 Johns. Ch. (N. Y.) 167.

agent is liable where his draft on the company in payment of the loss is not honored.<sup>155</sup> If a broker neglects to insure within a reasonable time, in consequence of which the insurance cannot be effected by the principal, he is liable,<sup>156</sup> and if an agent impliedly accepts the order, as by failing to promptly give notice of his refusal, he is liable for his neglect to insure.<sup>157</sup> So an agent in charge of a vessel, who insures it and neglects to renew, may be held liable therefor.<sup>158</sup> But an agent is only liable for failure to exercise diligence to procure a policy by the time agreed upon where he undertakes that the property should be insured from a certain time.<sup>159</sup> So where an agent neglects to follow instructions and to obtain insurance, he is not liable if the policy would have been void had the instructions been followed.<sup>160</sup> Nor is he liable where the principal sustains no actual loss in consequence of the agent's failure in his duty, or, as Emerigon says: "But if there has been no disaster, the case is one of wrong, without damage"; and no action lies, nor can the agent claim the premium. But in case the principal is entitled to sue, the measure of damages is the amount which could have been recovered against the underwriter had the express or implied directions to insure been followed;<sup>161</sup> and such damage must be established by proof.<sup>162</sup> And in case of a consignee, the evidence which renders him liable for failure to insure goods in his possession must be clear and conclusive.<sup>163</sup> If the agent of the insurer issues a policy upon a forbidden risk, and the company, when notified that such a risk has been assumed, informs the agent that he

<sup>155</sup> *Collins v. Insurance Co.*, 15 Ohio St. 215.

<sup>156</sup> *Turpin v. Bilton*, 5 Man. & G. 455.

<sup>157</sup> *Smith v. Lascelles*, 2 Term. Rep. 188, n., per Ashhurst, J.; *Emerigon on Insurance*, Meredith's ed. 1850, c. v, sec. 8, p. 119.

<sup>158</sup> *Strong v. Helgh*, 2 Rob. (La.) 103.

<sup>159</sup> *Arrott v. Walker*, 118 Pa. St. 249; 12 Atl. Rep. 280.

<sup>160</sup> *Alsop v. Coit*, 12 Mass. 40; *Miner v. Tagert*, 3 Binn. (Pa.) 204; *Webster v. De Tastet*, 7 Term Rep. 157.

<sup>161</sup> *Emerigon on Insurance*, Meredith's ed. 1850, c. v, sec. 8, p. 119; *Fornin v. Oswell*, 3 Camp. 357; *Glaser v. Cowle*, 1 Maule & S. 52; *Delaney v. Stewart*, 1 Term. Rep. 22; *De Tastet v. Crousillat*, 2 Wash. (C. C.) 132; *Wallace v. Telfair*, 1 Esp. 76.

<sup>162</sup> *Fornin v. Oswell*, 3 Camp. 357; *Bell v. Janson*, 1 Maule & S. 201.

<sup>163</sup> *Tonge v. Kennett*, 10 La. Ann. 800.

must cancel the policy, and he either refuses or fails to cancel such policy, he will be liable to the insurer for the amount paid by the company for any loss subsequently occurring.<sup>164</sup>

**679. Neglect to Effect a Valid Insurance Policy.**—An agent to procure a policy is liable where he places a risk in a company which is not solvent, when the use of proper diligence would have discovered that fact before the insurance was procured.<sup>165</sup> And where the consignees made advances and insured the goods for more than their full value, but neglected to have the necessary survey made, and thereby recovery was defeated by the insurers, the consignees were held liable to the consignor for the whole sum, less the advances.<sup>166</sup>

**§ 680. Liability of Voluntary or Gratuitous Agent.**—If a person voluntarily, without consideration, and without expectation of remuneration or reward, agrees to procure an insurance, and actually takes any steps in the matter, he is responsible for misfeasance, and if he proceeds to effect a policy, and is so negligent or unskillful that no benefit is derived therefrom, he is liable, although he was not bound to undertake the performance.<sup>167</sup> And the agent, acting gratuitously for a foreign correspondent, may be bound to comply with orders to procure insurance, and by a failure so to do, without notice to his correspondent, render himself liable for consequent losses, as where he has received such order, and has given the

<sup>164</sup> *Sun Fire Ins. Office v. Ermentrout*, 11 Pa. Co. Ct. 21; 21 Ins. L. J. 1055.

<sup>165</sup> *Hurrell v. Ballard*, 3 Fost. & F. 445; *Smith v. Price*, 2 Fost. & F. 748. See sec. 679, herein.

<sup>166</sup> *Urquhart v. Australian Co.*, 5 Scot. Jur. 348.

<sup>167</sup> *Thorne v. Deas*, 4 Johns. (N. Y.) 84, per Kent, C. J.; *Wallace v. Telfair*, 2 Term Rep. 188, n., per Buller, J.; *French v. Read*, 6 Binn. (Pa.) 308; *Coggs v. Barnard*, 2 Ld. Raym. 909; *Wilkinson v. Coverdale*, 1 Esp. 74. See *Beardsley v. Richardson*, 11 Wend. (N. Y.) 25; *Park v. Hammond*, 4 Camp. 344; *Ewell's Evans on Agency*, ed. 1879. 332-37. "1. An agent, whether remunerated or unremunerated, may be liable for negligence in performing an undertaking; 2. Actionable negligence in the case of an unremunerated agent consists in a failure to exercise that skill which is imputable to his situation or employment, or which he holds himself out to the world as possessing": *Id.* 332.

correspondent reasonable cause to believe such orders will be complied with.<sup>168</sup> So where one undertakes, voluntarily and without compensation, to perform an act requiring the trust and confidence of another, his acceptance of the trust creates a sufficient legal consideration to make it a duty to faithfully perform the same. So where a policy on the life of B. was made payable to M., who held it for the benefit of a creditor of B., though without such creditor's knowledge, it was held that B. having died, the creditor could maintain an action against M.<sup>169</sup> But a voluntary or gratuitous agent is not liable for a mere promise to obtain an insurance where he makes no effort or takes no steps whatever in the matter.<sup>170</sup> This case is criticised by Parsons,<sup>171</sup> in that it makes a distinction between a misfeasance and nonfeasance, and places the responsibility of such agent upon the same ground as that of a mandatory, who is only responsible when he attempts to do the act in question and does it amiss. He also declares that one undertaking to act, in regard to insurance transactions, at the request of another, has acquired a right to a compensation;<sup>172</sup> his duties and liabilities would be much the same as those of a paid agent. We cannot see that the question, whether the agent is entitled to claim a compensation, can affect the case. The point is, Did he then intend to ask or receive a compensation? The rule premises an acting without consideration or expectation or hope of reward, and to this extent Parsons admits that the case was decided aright. Duer says that "it cannot be denied that the distinction adopted by the court . . . is fully established by prior authorities."<sup>173</sup> Parsons also says that it was not a case of mandate, except perhaps in a limited

<sup>168</sup> *Smith v. Lascelles*, 2 Term. Rep. 187; *De Tastet v. Crousillat*, 2 Wash. (C. C.) 132; *Morris v. Summerl*, 2 Wash. (C. C.) 203.

<sup>169</sup> *Hutchings v. Miner*, 46 N. Y. 456; 7 Am. Rep. 369.

<sup>170</sup> *Thorne v. Deas*, 4 Johns. (N. Y.) 84. See *Delaney v. Stoddart*, 1 Term Rep. 22.

<sup>171</sup> 2 *Parsons on Marine Insurance*, ed. 1868, 437, and note, et seq.

<sup>172</sup> Duer says the principal "is not bound to compensate him [the voluntary agent] for his trouble and labor. The personal services of the agent, like those of the mandatory, are deemed to be gratuitous": 2 *Duer on Marine Insurance*, ed. 1846, 138, 139.

<sup>173</sup> 2 *Duer on Insurance*, ed. 1846, 129. See, also, 2 *Kent's Commentaries*, 570.

sense, and was certainly not a case of bailment.<sup>174</sup> While such voluntary and gratuitous agent is so bound to conduct himself as not to be guilty of gross negligence, a distinction should be made, even in this respect, between an unpaid unprofessional agent and an unpaid agent, whose situation is such as to imply skill in the business he undertakes, for in the latter case the failure to exercise such skill as his profession implies is gross negligence.<sup>175</sup>

**§ 681. Liability of Agent for the Premium.**—The usage in England requiring the underwriter to look to the broker for the premium does not exist here, and on this usage rests the rule estopping the underwriter from suing the assured where the policy acknowledges receipt of the premium.<sup>176</sup> An agent may, in this country, render himself liable for the premium, as where he gives his note therefor in his own name with a surety, and the principal is unknown to the underwriter, even though the latter knew of the agency.<sup>177</sup> And where a party

<sup>174</sup> 2 Parsons on Marine Insurance, ed. 1868, 439. But see 2 Kent's Commentaries, 569, 570, et seq.; Story on Bailments, sec. 165, et seq.; 1 Smith's Lead. Cas. 82; Edwards on Bailments, sec. 77, et seq.

<sup>175</sup> 1 Arnould on Marine Insurance, Perkins' ed., 150; 1 Id., MacLachlan's ed. 1887, 168, et seq., citing in 1850 edition, 2 Kent's Commentaries, 5th ed., 570; French v. Reid, 6 Binn. (Pa.) 308; Smedes v. Bank of Utica, 20 Johns. (N. Y.) 372; 3 Cow. (N. Y.) 662; Thorne v. Deas, 4 Johns. (N. Y.) 84; Boorman v. Browne, 3 Ad. & E., N. S. 511; Angell on Carriers, secs. 17, 20, et seq. See the rule as to mandatory, 2 Parsons on Contracts, 7th ed., 104, et seq. For discussion as to the different degrees of negligence, see Cooley on Torts, 2d ed., 751-53, et seq., \*630, \*631, et seq.

<sup>176</sup> 1 Marshall on Insurance, ed. 1810, 292, et seq.; 1 Phillips on Insurance, 8d ed., sec. 507; 1 Arnould on Insurance, Perkins' ed. 1850, 108-12, 122, secs. 60-62; 1 Id., MacLachlan's ed. 1887, 197, et seq.; Houston v. Robertson, 6 Taunt. 448; Power v. Butcher, 10 Barn. & C. 340, per Bayley, J.; Foy v. Bell, 3 Taunt. 492; Edgar v. Bumpstead, 1 Camp. 411; Minett v. Forester, 4 Taunt. 541, n., per Mansfield, C. J.; 1 Maule & S. 494; Edgar v. Fowler, 3 East, 222; Parker v. Smith, 16 East, 332; Dalzell v. Muir, 1 Camp. 532; 2 Duer on Marine Insurance, ed. 1846, 297, 298, 300; 1 Greenleaf's Evidence, sec. 26, note; Millick v. Peterson, 2 Wash. (C. C.) 31; Parker v. Beasley, 2 Maule & S. 423. See Clapp v. Tirell, 20 Pick. (Mass.) 247; Belden v. Seymour, 8 Conn. 304.

<sup>177</sup> Patapsco Ins. Co. v. Smith, 6 Har. & J. (Md.) 166; Taylor v. Lowell, 3 Mass. 352, per Sewall, J.

insuring has paid the premium down to the agent of the company, and before the agent has paid over the same, or assumed any liability on account of it, the company becomes insolvent, and such party notifies the agent that he claims the money, and does not rely upon the policy issued to him, which is worthless, he may recover back the premium in a suit against the agent, even though he does not surrender the policy until after suit brought.<sup>178</sup> Where the plaintiff paid to an insurance agent a premium, it being understood that he was to have a policy, and he received no policy, and sued the agent for the amount paid him, it was held that it was no defense that there was an oral agreement for insurance under which, in case of a loss, plaintiff could have recovered from the company, although no policy had issued.<sup>179</sup> So the assurer may look to the agent for the premium where the insurance is for the latter and others, the principal not being known, or, if no note is given, the party to whom the underwriter gives credit may be held for the premium.<sup>180</sup> But where the liability of the broker to the underwriter for premiums exists, it extends only to legal insurances.<sup>181</sup> And a broker representing an illegal partnership existing contrary to a statute, is not liable for premiums on policies subscribed in behalf of the illegal partnership.<sup>182</sup> So if a broker receives notice from the assured not to pay the premium, the insurance being illegal, the underwriter cannot recover it from the broker, though the latter had credited the underwriter therewith.<sup>183</sup> But although by usage the broker may have been solely liable for the premiums, yet the rule does not apply in case of fraud or collusion of the broker, and the assured, for in such case the assured is liable.<sup>184</sup> An agent may be liable to the insurers for the premium if his principal would have been liable in case of no agency existing.<sup>185</sup>

<sup>178</sup> *Smith v. Binder*, 75 Ill. 492.

<sup>179</sup> *Collier v. Bedell*, 39 Hun (N. Y.), 238.

<sup>180</sup> *Stackpoole v. Arnold*, 11 Mass. 27; *Patapsco Ins. Co. v. Smith*, 6 Har. & J. (Md.) 166.

<sup>181</sup> *Edgar v. Fowler*, 3 East, 222.

<sup>182</sup> *Rooth v. Hodgson*, 6 Term Rep. 405.

<sup>183</sup> *Edgar v. Fowler*, 3 East, 222.

<sup>184</sup> *Foy v. Bell*, 9 Taunt. 493; *Mavor v. Simeon*, 3 Taunt. 497.

<sup>185</sup> *Shee v. Clarkson*, 12 East, 507.

§ 682. **Liability for Concealment—Agent.**—A broker or agent of the assured will be liable to him for misrepresentations made to the underwriter, or for a concealment of material facts, whereby the policy is avoided, even though he be an unpaid agent.<sup>186</sup> So where a mercantile firm had consigned, by order, certain goods to the purchaser, and in their letter of advice to the consignee they misled the latter as to the day of shipment, and made a mistake in naming the vessel on which the goods were shipped, it was declared that the consignors were liable for the loss to the principal occasioned by the misrepresentations, and could not recover from the consignee, he having attempted to insure and failed.<sup>187</sup> But where the materiality of the fact is doubtful in point of law, or one upon which men in like business and conversant therewith differ, the broker might not be liable for his ignorance thereon, and consequent failure to communicate it to the underwriter.<sup>188</sup> Duer illustrates, as an exception to the rule, the case of a master who, by the breaking up of a voyage in consequence of a disaster, becomes agent for all concerned. He is of the opinion that if such agent is without experience or skill in insurance matters, and acts in good faith and diligence in employing an agent, he is not liable for failure to communicate all material facts to the agent, even though the policy be voided thereby.<sup>189</sup>

§ 683. **Liability of Officers of Company.**—The president of an insurance company may be held liable for money paid on policies upon the misrepresentations and fraud of the company's agent, with his collusion, as in case of a statement that the company had complied with the requirements of the statute authorizing it to transact business.<sup>190</sup> Where the president of an insolvent insurance company, during the pendency of a suit against the com-

<sup>186</sup> *Maydew v. Forrester*, 5 Taunt. 615; *Sellar v. Nork*, 1 Marshall on Marine Insurance, ed. 1810, 299; *Pawson v. Watson*, Doug. 785; *Wake v. Atty.* 4 Taunt. 393.

<sup>187</sup> *Arnot v. Stewart*, 5 Dow. 274.

<sup>188</sup> *Campbell v. Rickards*, 5 Barn. & Adol. 844, per Lord Denman. See *Rickards v. Murdock*, 10 Barn. & C. 527.

<sup>189</sup> 2 Duer on Insurance, ed. 1846, 205.

<sup>190</sup> *Belding v. Floyd*, 17 Hun (N. Y.), 208.

pany, purchased the claim at a discount, and then let judgment go against the company for the full amount, and the holder of an unsatisfied judgment, under the Missouri statute authorizing such proceedings, moved for judgment against the president as stockholder, it was held that he could not offset the face of the judgment on the claim purchased by him, but only the sum actually paid by him for it.<sup>191</sup> While officers of an insurance company are not bound to know its absolute solvent condition, they should nevertheless use diligence in keeping themselves informed as to its ability to pay its risks. Therefore, it is only in cases of negligence in this respect that they should be held guilty of fraud in issuing policies and taking notes in payment of premiums.<sup>192</sup> And the officers of a mutual company cannot release a policy-holder from liability for losses and expenses, incurred during the life of the policy, and actually existing at the time of cancellation, by voluntarily canceling the policy and releasing the assured, in view of the company's insolvency.<sup>193</sup> Directors are responsible, as principals or partners, for all contracts entered into by a company in its preliminary stages of formation before the act of incorporation is passed, where the acts of the directors are within the scope of the business.<sup>194</sup> Directors are also personally liable to an assured who, by reason of the insolvency of the company, has been unable to recover upon his policy where they have fraudulently made and published false representations as to the financial condition of the company, whereby the plaintiff was induced to insure therein; and it is no defense that they were acting officially, or that there was no privity of contract between them and the plaintiff.<sup>195</sup> So the directors and corporators of a mutual assessment company are personally liable to the assured for a loss where they misappropriate more than sufficient to satisfy his claim out of the company's funds arising from dues and advance assessments, in consequence of

<sup>191</sup> *Lingle v. National Ins. Co.*, 45 Mo. 109.

<sup>192</sup> *Brown v. Donnell*, 49 Me. 421; 77 Am. Dec. 266.

<sup>193</sup> *Deane v. Millville Mut. M. & F. Ins. Co.*, 43 N. J. Eq. (18 Stew.) 522; 11 Atl. Rep. 739.

<sup>194</sup> *Booth v. Wonderly*, 36 N. J. L. 250.

<sup>195</sup> *Salmon v. Richardson*, 30 Conn. 360; 79 Am. Dec. 255.



which the company becomes insolvent.<sup>196</sup> And a policy may be enforced against the directors personally where they fraudulently consent to the issue of a policy in a certain city, wherein they have no right to transact business, by reason of the company's charter locating it in another city.<sup>197</sup> So if a company's reinsurance of its risks operates under a statute as a transfer, in view of insolvency, the directors are personally liable, even though they acted in good faith to policy holders not secured by such reinsurances.<sup>198</sup> But where the directors have closed up a certain class of business, and canceled the policies, they cannot be held personally liable for neglect to make an assessment upon subsequent policy holders to meet a judgment on a note given for a loss under a policy in that class.<sup>199</sup> And where the statute provides only for a liability under policies in a stock company for losses equal to the capital stock, the amount of the loss sustained by a policy holder must be first fixed by a judgment against the company before the directors can be held liable.<sup>200</sup> Nor can a claimant under a policy hold the directors personally liable after he receives from the company a note in settlement of his claim, and either releases the claim or obtains judgment on the note alone.<sup>201</sup>

**§ 684. Liability of Company for Agent's Frauds, etc.<sup>202</sup>**

An insurance company may be held liable to a third person for the frauds, deceits, and misrepresentations, injurious statements, and acts of its agent, when the acts so committed are apparently within the general scope of his authority, although he exceeded his actual authority, and such acts were not authorized, either in detail or by his general instructions and

<sup>196</sup> *Stewart v. Lee Mut. F. Ins. Assn.*, 64 Miss. 499; 1 S. Rep. 743.

<sup>197</sup> *Booth v. Wonderly*, 96 N. J. L. 250.

<sup>198</sup> *Casserly v. Manners*, 48 How. Pr. (N. Y.) 219.

<sup>199</sup> *Upton v. Pratt*, 103 Mass. 551, under Mass. Gen. Stat., c. 53, sec. 48, as to "property belonging to the period assessed, the proceeds of which can be applied."

<sup>200</sup> *Kinsley v. Rice*, 10 Gray (Mass.), 325; Mass. Rev. Stat., c. 37, sec. 18.

<sup>201</sup> *Raber v. Jones*, 40 Ind. 436.

<sup>202</sup> See as to liability of principals generally for agent's frauds, note 52 Am. Dec. 57, 58; as to liability of principal generally for omission of duty by agent, note 54 Am. Rep. 233-35.

powers.<sup>203</sup> So the principal is liable for the acts and neglect of agents expressly appointed, as in case of factors or consignees, for the reason that they represent the principal in the business in which they are engaged or employed,<sup>204</sup> and also because the insured must suffer for the fraudulent or negligent acts of his agent, for he has put it within his power to commit the wrong.<sup>205</sup> Where a policy is forfeited for neglect to notify the company of an encumbrance, and although the agent was informed of the encumbrance no inquiry was made of him as to what was necessary to keep the policy alive, nor was the agent requested to, nor did he undertake to, do anything to effect that purpose, the cause does not render a mutual fire insurance company liable, under the Vermont statute, for the acts and neglects of their agents while in the performance of their duties as such.<sup>206</sup> And the fact that a loan agent is the agent of the company to procure insurance does not make him their agent, in respect to loans obtained by him from the company, and so render them liable for usury for commissions deducted by him.<sup>207</sup> But a general agent of an insurance company for a district embracing several states has such authority in one of them, though his office is in another, as will make the company liable for malicious prosecution instituted in the company's name by his connivance in either state.<sup>208</sup>

<sup>203</sup> New York L. Ins. Co. v. McGowan, 18 Kan. 300. See Carpenter v. American Ins. Co., 1 Story (C. C.), 57; Draper v. Charter Oak Ins. Co., 2 Allen (Mass.), 569.

<sup>204</sup> Ludlow v. Columbian Ins. Co., 1 Johns. (N. Y.) 335.

<sup>205</sup> Nicoll v. American Ins. Co., 3 Wood & M. (C. C.) 529; Smith v. Empire Ins. Co., 25 Barb. (N. Y.) 497.

<sup>206</sup> Tarbell v. Vermont Mut. F. Ins. Co., 63 Vt. 53; 22 Atl. Rep. 533, under Rev. Laws Vt., sec. 3617.

<sup>207</sup> Cox v. Insurance Co., 113 Ill. 382; Massachusetts Mut. L. Ins. Co. v. Boggs, 121 Ill. 119; 13 N. E. Rep. 550.

<sup>208</sup> Turner v. Phoenix Ins. Co., 55 Mich. 236.

## CHAPTER XXIV.

### AGENTS — RIGHTS AND REMEDIES — TERMINATION OF AGENCY.

- § 690. Agent's and broker's lien, when it attaches and what it covers.
- § 691. Agent's lien: Assignment of policy by assured.
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- § 701. Same subject: English and American authorities.
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§ 690. **Agent's and Broker's Lien—When it Attaches and What it Covers.**—The policy when effected is the property of the assured, whether it be in his agent's or broker's

hands;<sup>1</sup> but if an insurance broker or other agent is expressly or impliedly authorized by the assured to procure an insurance, he has a lien against his principal upon the policy in his possession. Such lien covers all sums due him for commissions, disbursements, advances, and services in and about that business, and such agent may retain the policy until the amount so due him is paid or the lien otherwise discharged. But the lien does not embrace items, accounts, or a general balance wholly disconnected with, or liabilities outside of, the business of the agency. The agent must also have done the act which gives a right to the lien in that particular character to which the right attaches. The lien does, however, embrace all outstanding liabilities of the principal arising out of the business of the agency, and in cases of mercantile agents effecting insurances for a correspondent, the lien may cover a balance due on mercantile transactions arising out of that agency.<sup>2</sup> The agent's right, however, to retain the policy must rest upon either the consent of the principal or upon his demands for advances and commissions, on account of the policy, or upon the fact that he is a general mercantile agent, or upon some express or implied agreement, or upon a general usage or particular usage known

<sup>1</sup> See 1 Marshall on Marine Insurance, ed. 1810, 301 b.

<sup>2</sup> "Insurance brokers have now by general usage a lien upon policies of insurance in their hands, procured by them for their principals, and also upon the moneys received by them upon such policies," per Tenney, J., in *McKenzie v. Nevins*, 22 Me. 138. Where the broker claimed a lien upon the policy on the ground of premiums advanced, it was said by the court: "If this fact of the payment of the premium had been made out, the court would have been disposed to award Mr. Lindsay payment out of the proceeds of the policy; for although he had once parted with it, yet coming to his hands again to be put in suit, his lien for the premium would revive, and be protected, unless the manner of his parting with it had manifested an intention in him altogether to abandon such lien," per Livingston, J., in *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268, 285. See, also, *Jarvis v. Rogers*, 15 Mass. 396, per Wilde, J.; *Muir v. Fleming*, Dow. & Ry., pt. 1, N. P. C. 29; *Godin v. London Assur. Co.*, 1 Burr. 493; *Olive v. Smith*, 5 Taunt. 56; *Mann v. Shiffner*, 2 East, 523; *Foughton v. Matthews*, 3 Bos. & P. 485; *Dixon v. Stansfield*, 10 Com. B. 398; *Walker v. Birch*, 6 Term Rep. 258, per Lawrence, J.; *Foster v. Hoyt*, 2 Johns. Cas. (N. Y.) 327; *Levy v. Barnard*, 8 Taunt. 154; 2 Duer on Marine Insurance, ed. 1846, 285, et seq.; 1 Arnould on Marine Insurance, Perkins' ed., 139, et seq. See *Hunter v. Leathley*, 10 Barn & C. 858.

to the assured, or upon the course of business between him and the principal.<sup>3</sup> But in certain cases the agent may have a lien on the policy for advances made in relation to matters outside of the insurance business, a credit being given on the implied security of the policy.<sup>4</sup> It is held, however, that the agent must produce the policy in evidence, if necessary, to his principals, notwithstanding his lien thereon, and upon his lien being satisfied, must deliver it to his principal on demand.<sup>5</sup> And a broker who, by a course of dealing sanctioned by the underwriter, has an implied authority to adjust and satisfy losses, acquires a lien on the policy for his reimbursement.<sup>6</sup> If the broker has paid the premiums on two insurances, effected by him, and he retains the policies, he has a lien against the assured for both premiums on the amount of loss paid him under one of the policies.<sup>7</sup> And where, in case of the bankruptcy of the underwriter, the broker retains the policies and abandonments in his hands, he has a lien for losses paid by him on money paid for the benefit of all parties interested.<sup>8</sup> Although the lien of an agent, strictly speaking, is on the policy, yet it is regarded as attaching on all moneys derived thereunder, with a right to apply the same to a liquidation of the claim.<sup>9</sup> So the broker of the underwriter who, by a course of dealing between the underwriter and himself, is accustomed to pay losses and retain policies, has a lien upon salvage for his general balance against the underwriter.<sup>10</sup> And a mercantile agent acting in the capacity of a general agent for a foreign house, and directed to effect an insurance on a particular voyage, cannot have a lien on the loss paid under that policy for

<sup>3</sup> See 2 Phillips on Insurance, 3d ed., 560, sec. 1912, citing *Green v. Farmer*, 4 Burr. 2214.

<sup>4</sup> *Olive v. Smith*, 5 Taunt. 56.

<sup>5</sup> *Hunter v. Leathley*, 10 Barn. & C. 858. See criticism of this case in 2 Duer on Marine Insurance, ed. 1846, 293, et seq.

<sup>6</sup> *Moody v. Webster*, 8 Pick. (Mass.) 424.

<sup>7</sup> *Leeds v. Mercantile Ins. Co.*, 6 Wheat. (U. S.) 565.

<sup>8</sup> *Moody v. Webster*, 3 Pick. (Mass.) 424.

<sup>9</sup> 2 Duer on Insurance, ed. 1845, 288, citing *Story on Agency*, sec. 379.

<sup>10</sup> See *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268; *Olive v. Smith*, 5 Taunt. 56; *Moody v. Webster*, 3 Pick. (Mass.) 424; *Foster v. Hoyt*, 2 Johns. Cas. (N. Y.) 327.

a general balance due him as a factor;<sup>11</sup> nor does a lien on the policy extend to money previously lent to principal outside of the insurance agency.<sup>12</sup> So one who procures insurance in his own name for another person, not as a broker or general agent, but in pursuance of a specific order, has no lien on the policy, and although a ship's husband he has no lien for the balance of his account.<sup>13</sup> And the fact that a policy is left in the agent's hands for custody only, gives him no lien for money advanced outside that particular agency.<sup>14</sup> And, in this country, the fact that the policy in the agent's possession acknowledges payment of the premium is not sufficient evidence of actual payment to warrant a lien.<sup>15</sup> In cases also of voluntary and gratuitous agents, Duer says that a lien can only exist where the principal chooses to grant it, because there is no established usage to warrant such a lien.<sup>16</sup> But a broker effecting insurance on goods to be shipped has a lien on the loss paid for a general balance against the shipper, although the consignment was conditioned that the proceeds of the policy be paid to a third person.<sup>17</sup> In cases of illegal insurances, as no right exists to recover the premium, though actually paid, it necessarily follows that no lien would exist in such cases. It would be proper to state here that the system of credits between the broker and the assured and assurer, evidenced by the English cases, gives a right to a lien in many cases which are not applicable here. But if by the usual course of business between the parties such a system arises, or there be a usage established, then such English cases may be resorted to for an exposition of the law having the force of authorities, so far as they do not conflict with established rules of law or of decisions here.<sup>18</sup>

<sup>11</sup> *Dixon v. Stansfield*, 10 Com. B. 398.

<sup>12</sup> *James v. Rogers*, 15 Mees. & W. 1375.

<sup>13</sup> *Reed v. Pacific Ins. Co.*, 1 Met. (Mass.) 166.

<sup>14</sup> *Muir v. Fleming*, Dow. & Ry. N. P. C. 29.

<sup>15</sup> *Millick v. Peterson*, 2 Wash. (C. C.) 31.

<sup>16</sup> 2 *Duer on Marine Insurance*, ed. 1846, 285, 286.

<sup>17</sup> *Mau v. Shiffner*, 2 East, 523.

<sup>18</sup> *Insurance Co. v. Smith*, 3 Whart. (Pa.) 521. See *Taylor v. Lowell*, 3 Mass. 331; *Phoenix Ins. Co. v. Fignat*, 7 Johns. (N. Y.) 383; *Millick v. Peterson*, 2 Wash. (C. C.) 31.

§ 691. **Agent's Lien—Assignment of Policy by Assured.**—The general rule is, that in case of an assignment by the assured of the policy retained in the agent's hands for a lien, the assignee takes it subject thereto.<sup>19</sup> Thus, a correspondent was directed to insure; the bill of lading was assigned to another, who became assignee of the policy, and it was held that the assignee took the policy subject to the correspondent's lien for a general balance.<sup>20</sup> So where a broker who obtained the insurance knew that the principal had assigned his interest in certain ships then building to B. and W., to secure a loan, and B. was to keep the ships insured, and to assign the policies to B. and W., it was held that the broker had a lien on the policies for premiums advanced by him, but not for a balance due him from B. on a general account.<sup>21</sup> And an agent affecting an insurance for account of "whom it might concern," loss payable to himself, has no lien on the amount of the policy for a general balance due from the owner, where the latter has assigned his interest to another without notice.<sup>22</sup>

§ 692. **Lien of Sub-agent or Broker.**—A sub-agent or broker has no lien on the policy nor on insurance moneys in his hands for a general balance due him on account of the agent, nor from premiums due from the agent or other policies, where he knows, or from the nature of his instructions has reason to believe, that his employer is merely acting as agent for another. He only has a lien for particular premiums and advances paid upon the policy, even though the policy be in the name of the agent. But if the subagent or broker effects a policy in ignorance of the fact that it does not belong to his employer, and may reasonably believe him to be the principal, he has a lien upon the policy for the balance due him from such employer. So in case of a statement to the broker that the policy was for a certain person whose name was filled in the policy as assured, the broker can claim no lien for a general

<sup>19</sup> *Mau v. Shiffner*, 1 East, 523.

<sup>20</sup> *Mau. v. Shiffner*, 2 East, 523.

<sup>21</sup> *Ladbroke v. Lee*, 4 De G. & Sm. 106.

<sup>22</sup> *Rogers v. Traders' Ins. Co.*, 6 Paige Ch. (N. Y.) 583.

balance against his employer.<sup>23</sup> And where a *del credere* agent insures in his own name, and does not disclose to the broker that he acts as agent, the broker is entitled to retain in his hands the policy, or any money received from the underwriters upon it, for the general balance as between him and the agent.<sup>24</sup> So where defendants were directed by a party to procure a policy on a cargo, without notice that the insurance was for other than the employer, the defendants were held entitled to a lien for a general balance.<sup>25</sup> But information that the property was neutral, given by the agent to the broker is sufficient notice of the employer's agency, and the broker has no lien for a general balance against such agent.<sup>26</sup> And a broker, although ignorant that his employer was agent, may be held liable to the insured for moneys in excess of his liens on the policy as against the agent.<sup>27</sup> And where the agent induces the broker by his representations to believe that he is the principal, the broker has a lien on the policy for a general balance due him from such employer.<sup>28</sup>

<sup>23</sup> *Snook v. Davidson*, 2 Camp. 217. See *Jarvis v. Rogers*, 13 Mass. 389; *Picquet v. McKay*, 2 Blatchf. (C. C.) 465.

<sup>24</sup> *George v. Olaggett*, 7 Term Rep. 350.

<sup>25</sup> *Maun v. Forrester*, 4 Camp. 60.

<sup>26</sup> *Maans v. Henderson*, 1 East, 334.

<sup>27</sup> *Mann v. Forrester*, 4 Camp. 60.

<sup>28</sup> *Westwood v. Bell*, 4 Camp. 349. See *Mann v. Forrester*, 4 Camp. 60. The authorities most frequently cited in support of the rules above given are *Foster v. Hoyt*, 2 Johns. Cas. (N. Y.) 327; *Man v. Shiffner*, 2 East, 523; *Snook v. Davidson*, 2 Camp. 217; *Maans v. Henderson*, 1 East, 335; *Losh v. Douglass*, 20 Court of Sessions Cases, 58; *Levy v. Barnard*, 8 Taunt. 153; 2 Moore, 34; *Bank of the Metropolis v. New England Bank*, 17 Pet. (U. S.) 174; 1 How. (U. S.) 234; *Westwood v. Bell*, 4 Camp. 349, per Gibbs, C. J.; *Swift v. Tyson*, 16 Pet. (U. S.) 21, 22. See, also, 1 Marshall on Marine Insurance, ed. 1810, \*302; 1 Arnould on Marine Insurance, Perkins' ed., 140, et seq.; 2 Duer on Marine Insurance, ed. 1846, 282, et seq.; 2 Phillips on Insurance, 3d ed., 562-66, sec. 1916. In *Lanyon v. Blanchard*, 2 Camp. 597, the reporter's note seems to imply a different rule, however. In 2 Duer on Insurance, ed. 1846, 355 et seq., the ground of the decision seems to be based by that author upon the fact that there was an implied notice to the broker of the agency. But in 2 Phillips on Insurance, 3d ed., such implied notice is declared not to be the ground of the decision. In 2 Parsons on Marine Insurance, ed. 1868, 434, this case is cited as an authority under the proposition. "But if he, the broker, did not know that he was a subagent, and supposed that he was effecting insurance for his employer, who was the actual insured,



§ 693. **How Agent's Lien may be Lost or Waived.**—An insurance broker or other agent loses his lien by voluntarily giving up the possession of the policy to his principal;<sup>29</sup> and a lien being strictly personal to the agent, it cannot be transferred to avail a third party as against the principal.<sup>30</sup> So an agent may lose his lien by an act which amounts impliedly to a credit to his principal, as in case of receiving a note from his principal, payable in future, or generally where he accepts other security for the debt, or holds the policy for another's benefit,<sup>31</sup> and an agent releases his lien on the policy by pledging it as his own.<sup>32</sup> So the lien is lost where the agent delivers the policy to his principal and he assigns it to a bona fide purchaser without notice.<sup>33</sup> And if a broker employs another to effect insurances, and the latter executes orders and pays premiums, and delivers part of the policies into the first broker's hands, his lien on the policies retained does not cover premiums for those delivered.<sup>34</sup> But an agent does not release his lien on the policy by handing it to another than the prin-

it might be otherwise," viz., that he might have a lien against the agent in such case, although he adds, "but this exception does not appear to us to be unquestionable." But in *Westwood v. Bell*, 4 Camp. 349, 1 Holt, 122, Gibbs, C. J., declares that "in *Lanyon v. Blanchard*, likewise the defendant must be taken to have had notice that the person who employed him was not the principal." This is also the construction given by this case in 1 *Arnould on Marine Insurance*, Perkins' ed., 141. The authority of *Bell v. Jutting*, 1 Moore, 155, and *Roberts v. Ogilby*, 9 Price, 269, so far as they seem to conflict with *Mann v. Forrester*, 4 Camp. 60, is denied in 2 *Duer on Insurance*, ed. 1846, 361, note 2.

<sup>29</sup> *Cranston v. Philadelphia Ins. Co.*, 5 Binn. (Pa.) 538; *Hewison v. Guthrie*, 2 Bing. N. C. 755, 759; *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 287. See as to the general rule, *Jordan v. James*, 5 Ohio, 89, 98; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 487; *Danforth v. Pratt*, 42 Me. 50; *King v. Indian Orchard Canal Co.*, 11 Cush. (Mass.) 231.

<sup>30</sup> *Holly v. Huggeford*, 8 Pick. (Mass.) 77, per Parker, C. J.; *McComble v. Davis*, 7 East, 5; *Story on Agency*, 2d ed., sec. 372.

<sup>31</sup> *Hewison v. Guthrie*, 2 Bing. N. C. 755; *Cowell v. Simpson*, 16 Ves. Jr. 276.

<sup>32</sup> *McComble v. Davies*, 7 East, 5; *Daubigny v. Duval*, 5 Term Rep. 604; *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 287; *Sweet v. Pym*, 1 East, 4; *Urquhart v. McIver*, 4 Johns. (N. Y.) 103.

<sup>33</sup> *Cranston v. Philadelphia Ins. Co.*, 5 Binn. (Pa.) 538.

<sup>34</sup> *Brooks v. Davidson*, 2 Camp. 218.

principal to hold for the agent's benefit, even though it be transferred as security for the agent's benefit of a demand against his principal assigned to another.<sup>35</sup> And the broker's possession being that of the agent who employs him, the agent's lien attaches while the policy is in the broker's possession. Thus, where the agent employed a broker to effect insurance on wheat purchased for his principal and shipped by him, and the principal became bankrupt, the broker having retained the policies, it was decided that his possession was that of the agent, who might retain a lien thereon for a special and general balance.<sup>36</sup> But the mere intermixing of charges in relation to the policy with those of the general account is not a waiver of the lien,<sup>37</sup> and it is held, in case of chattels that the parting with possession of the property to the general owner does not destroy the lien therein, where such act can be done consistently with the contract, the intention of the parties, and the course of business.<sup>38</sup> And, in general, the lien is not lost where, by fraud or against the lienholder's will, he parts with his possession.<sup>39</sup>

**§ 694. Revival of Agent's Lien.**—If an insurance broker or other agent loses his lien by giving up the policy to the principal, and the policy is restored to him, the lien revives, unless it appears from the manner of resurrendering possession that the lien was intended to be abandoned, or the rights of third parties have intervened, or where it is returned for a specific purpose agreed upon. Thus, the lien does not revive where the policy is given into the agent's hands to be put in suit, or where it is delivered for any special purpose not consistent with the lien, or where in the meantime the policy

<sup>35</sup> *Urquhart v. McIver*, 4 Johns. (N. Y.) 103.

<sup>36</sup> *Gardner v. Milne*, 20 Court of Sessions Cases, 535; *Mau v. Shiffer*, 2 East, 523. See *Wilmot v. Wilson*, 3 Court of Sessions Cases, 815; 13 Scot. Jur. 337; 2 Duer on Marine Insurance, ed. 1846, 291, sec. 11.

<sup>37</sup> *McKenzie v. Nevins*, 22 Me. 138; 38 Am. Dec. 291. But see contra as to case of goods, *McKean v. Wagenblast*, 2 Grant's Cas. (Pa.) 462.

<sup>38</sup> *Spaulding v. Adams*, 32 Me. 211.

<sup>39</sup> *Grinnell v. Cook*, 3 Hill (N. Y.), 493; 38 Am. Dec. 663.

has been assigned to a third party in good faith,<sup>40</sup> for a valuable consideration. In the case of a subagent, it seems that if when he recovers possession of the policy he knows, or has reason to believe, that his employer was merely an agent, the lien does not revive.<sup>41</sup>

§ 695. **Agent's Right to Commissions.**—An agent will be bound by the terms of a circular received from the company, and which provides the rates of compensation to its agents, where he has acted under the same for years without objection.<sup>42</sup> And an agent's right to renewal commissions or premiums paid on policies, obtained by him during the period of his employment as agent is not divested by the termination of the contract of employment by mutual agreement, it appearing that it was agreed that renewal commissions on policies which he should obtain were to be paid him on receipt of the premiums by the company.<sup>43</sup> So where one was appointed a district agent under an agreement to carry out all contracts in force with the company's subagents in that territory, and that he should be paid a certain additional commission on premiums on all new policies placed by him or his agents in that field during a stated period, it was held that he was entitled to the agreed-upon commission on all premiums paid in by the subagents prior to the discontinuance of the contract.<sup>44</sup> So where the contract provided for a percentage to be paid the agent on all renewals of policies obtained by him so long as they remained in force, it was held, in an action for breach of the contract, that evidence was admissible as to the probable expectancy of the duration of the policies, and that

\* *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268; *Levy v. Barnard*, 8 Taunt. 149; 2 Duer on Marine Insurance, ed. 1846, 290; 1 Marshall on Marine Insurance, ed. 1810, \*293. But see as to general rule, *Story on Agency*, 370, p. 466; *Allen v. Spencer*, 1 Edm. Sel. Cas. (N. Y.) 117.

" *Levy v. Barnard*, 8 Taunt. 149; 2 Duer on Marine Insurance, ed. 1846, 290.

" *Stagg v. Insurance Co.*, 10 Wall. (U. S.) 589.

" *Hale v. Brooklyn L. Ins. Co.*, 120 N. Y. 294; 24 N. E. Rep. 317; 19 Ins. L. J. 666.

" *Northwestern Mut. L. Ins. Co. v. Mooney*, 108 N. Y. 118; 15 N. E. Rep. 303.

an established custom could be proven under which an agent was given property in lists of policies which he had procured.<sup>45</sup> So if an agent has been discharged, the probable value of renewals during the balance of the term of employment contracted for may be proven by competent witnesses.<sup>46</sup> But in an action by a local agent of a life insurance company against the company to recover the commuted value of commissions on the renewal of policies after the plaintiff was discharged, the plaintiff will not be allowed to show a local usage amongst other companies to vary the terms of an express contract fixing the commissions to be paid him;<sup>47</sup> nor is evidence admissible, in case of the breach of a contract of employment, to show the agent's probable earnings after breach upon the basis of his earnings before the trial.<sup>48</sup> In another case, the plaintiff agreed to solicit insurance on commission, with additional commissions on renewals. Defendant reserved the right to discharge plaintiff for any malpractice, in which case he should forfeit such additional commissions. Plaintiff having been discharged for failure to forward premiums, testified in an action for such additional commissions that he had taken notes for the premiums under direction of defendant's vice-president, which the latter denied having given. It was held that on such conflicting evidence a verdict for plaintiff would not be disturbed.<sup>49</sup> An insurance agent, whose agency has been terminated, cannot enjoin the company from receiving premiums, although he may be entitled to a commission thereon.<sup>50</sup>

**§ 696. Subagent's Right to Commissions.**—The compensation of a local agent employed by a general agent may be

<sup>45</sup> *Ensworth v. New York L. Ins. Co.*, 1 Flap. (C. C.) 92.

<sup>46</sup> *Lewis v. Atlas etc. Ins. Co.*, 61 Mo. 534. For other cases as to renewal commissions, see *Parks v. Piedmont etc. Co.*, 48 Ga. 601; *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310; *Lester v. New York L. Ins. Co.*, 84 Tex. 87.

<sup>47</sup> *Partridge v. Life Ins. Co.*, 1 Dill. (C. C.) 139. See as to nonliability for commissions, *Manning v. John Hancock M. L. Ins. Co.*, 100 U. S. 693; *Partridge v. Phoenix Mut. L. Ins. Co.*, 15 Wall. (U. S.) 573.

<sup>48</sup> *Lewis v. Atlas etc. Ins. Co.*, 61 Mo. 534.

<sup>49</sup> *Sterling v. Metropolitan L. Ins. Co.*, 2 N. Y. Supp. 84.

<sup>50</sup> *Machette v. Insurance Co.*, 6 Phila. (Pa.) 296. See further as to agent's rights to commissions, *Ætna L. Ins. Co. v. Nelson*, 84 Ind. 347; *Spaulding v. New York L. Ins. Co.*, 61 Me. 329.

limited by the latter's contract with the company;<sup>51</sup> and where one is appointed a district agent by a general agent, he has no right of action against the company for commissions or other services where his contract expressly so provides.<sup>52</sup>

§ 697. **When Agent not Entitled to Commissions.**—An agent is only entitled to commissions on premiums earned before cancellation of the risk,<sup>53</sup> and where an insurance company canceled a policy a few days after issue, and returned the premium received, less the earned premium and the commission paid its agent, and it demanded of the agent that he should return his commission to the insured, less the commission on the earned premium, and the agent did so and sued the company for the amount returned, it was held that there was no cause of action, as there was no mistake as to the facts, and the payment was the voluntary act of the agent.<sup>54</sup> So an insurance agent authorized to insure property, who delivers a policy to take effect on a future date, which is returned and canceled before that date, cannot recover the value of his services in writing the policy.<sup>55</sup> And agents, being entitled to a certain rate per cent for commissions, who deduct the same on the issuance of a policy, and, after their term of employment expires, induce the assured to cancel his policy and insure in another company for which they become agents, will be obliged to refund to the company that same rate per cent of the amount the company had to refund the assured as they had deducted for commissions.<sup>56</sup> The right of an agent of a life insurance company to commissions on renewals of policies issued by his procurement ceases when his agency terminates; the rule for the allowance being limited to apply "to business procured by the agent under this appointment."<sup>57</sup> And if the

<sup>51</sup> *United States L. Ins. Co. v. Hessburg*, 27 Ohio St. 393.

<sup>52</sup> *Lester v. New York L. Ins. Co.*, 84 Tex. 87; 19 S. W. Rep. 356.

<sup>53</sup> *Devereux v. Insurance Co.*, 98 N. C. 6; 3 S. E. Rep. 639.

<sup>54</sup> *Devereux v. Insurance Co.*, 98 N. C. 6; 3 S. E. Rep. 639.

<sup>55</sup> *Townsend v. Tompkins* (Sup. Ct.), 32 N. Y. St. Rep. 923; 10 N. Y. Supp. 797.

<sup>56</sup> *American Steam-boiler Co. v. Anderson*, 130 N. Y. 134; 29 N. E. Rep. 231; 41 N. Y. St. Rep. 485.

<sup>57</sup> *Spaulding v. New York L. Ins. Co.*, 61 Me. 329.

general agent of an insurance company is discharged for a defalcation, he can claim no interest in premiums thereafter to be collected on policies issued through his agency.<sup>58</sup> So if either party may terminate the contract at pleasure, no right exists to commissions not collected before the termination of the employment, although it be done by the company, where it also appears that commissions were to be on premiums collected.<sup>59</sup> So where an action was brought by an insurance agent for breach of contract against defendant, by whom he was employed to solicit renewal policies on commissions, it was held, in the absence of any agreement of employment for a definite period of time, that the contract right of the plaintiff to the commissions did not make his agency an agency coupled with an interest, and that it might be determined by defendant at will.<sup>60</sup> In another case it was agreed between a life insurance company and its agent that he should have twenty-five per cent on first year payments, and five per cent on renewals. The company afterwards ceased business, and assigned to another company the policies, and it was held that the agent's claim to the five per cent ceased.<sup>61</sup> And an insurance agent has no right to commissions accruing after he voluntarily terminates his employment.<sup>62</sup>

**§ 698. Rights of Agents as to the Premium.**—The premium here is a debt due from the assured to the assurer. But there may be a special agreement to the contrary, or a different rule may be established by a course of dealing between the parties, or circumstances may arise which would change the rule. Thus where the assured directs the broker to charge him the premium, or has given him a note therefor, the latter may maintain his action for the same.<sup>63</sup> But taking the agent's note does not of itself alone waive the

<sup>58</sup> *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310; 50 Am. Rep. 20.

<sup>59</sup> *Spaulding v. New York etc. Ins. Co.*, 61 Me. 329.

<sup>60</sup> *Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843.

<sup>61</sup> *North Carolina State L. Ins. Co. v. Williams*, 91 N. C. 69; 49 Am. Rep. 637.

<sup>62</sup> *Shaw v. Home L. Ins. Co.*, 49 N. Y. 681.

<sup>63</sup> *Taylor v. Lowell*, 8 Mass. 331, 352.

right to look to the assured for the premium,<sup>64</sup> and an action cannot be maintained by the holder of a life insurance policy against the agents of a life insurance company for premiums paid them on the same, when it appears that the policy conforms to the application and is in accordance with the agreement of such agents. Nor can such an action be maintained against either the principal or agent without proving that he has offered to return the policy, or that it is worthless.<sup>65</sup> And the principal may be liable here to the agent for the premium where the latter can show that he has actually paid it to the insurer, although this must be proven by other evidence than the acknowledgment in the policy;<sup>66</sup> and where the company's agent pays the premium himself, he may recover the same from the assured.<sup>67</sup> So it would undoubtedly be true, that if the agent of the company had, by a course of dealing and by a system of credits and mutual accounts between his principal and himself, received from the latter a credit for the premium, that he could recover the same from the assured. And where, after the maturity of a premium note, the insurance company treats the policy as in force and the premium as paid, charging the amount thereof to the agent, and making him answerable therefor, and turns the note over to the agent, the agent is entitled to recover on the note against the insured; but no recovery can be had thereon if, when the note became dishonored, it was repudiated by the company and the policy treated as forfeited.<sup>68</sup> If the policy provides that the unpaid premium shall be deducted in case of loss from the amount due therefor, the acknowledgment of the payment in the policy does not discharge the assured of his liability.<sup>69</sup> A firm may be liable for the premium by reason of the act of one of its partners. Thus, if by the articles of agreement between partners the

<sup>64</sup> *Insurance Co. of Pennsylvania v. Smith*, 3 Whart. (Pa.) 520.

<sup>65</sup> *Farron v. Cochran*, 72 Me. 309.

<sup>66</sup> *Millick v. Peterson*, 2 Wash. (C. C.) 31.

<sup>67</sup> *Sheldon v. Connecticut Ins. Co.*, 25 Conn. 207; *Home Ins. Co. v. Curtis*, 32 Mich. 402.

<sup>68</sup> *Marskey v. Turner*, 81 Mich. 62; 45 N. W. Rep. 644.

<sup>69</sup> See *Phoenix Ins. Co. v. Figuet*, 7 Johns. (N. Y.) 383; *Millick v. Peterson*, 2 Wash. (C. C.) 31; *Reed v. Pacific Ins. Co.*, 1 Met. (Mass.) 171.

powers of individual partners are restricted in the matter of effecting insurances, and the limitation is unknown to the insurer or the agent employed, the firm is bound by the act of a member in effecting the insurance, or in the employment of the agent therefor, and is liable for the premium or commissions.<sup>70</sup> But if a broker effects a policy for a part owner, acting without authority, to insure for the other part owners, he can look only to his employer for his premiums, and is responsible to him alone for the losses paid the broker by the underwriters, unless such part owners adopt the principal's unauthorized act.<sup>71</sup> But a broker cannot recover from the insurers the premium, unless the insurance is legal, even though the broker may have actually paid the same.<sup>72</sup> It is held in England that it is no defense, in an action by the broker for premiums against the assured, that the underwriters' names had not been submitted to him for approval, although the agreement was that the policies should be effected with underwriters satisfactory to the assured, where the insurance was effected and the assured made no objection till the voyage was completed.<sup>73</sup> It is also held that as the broker is the agent of both insured and insurer, he may, upon notice warranting such act, return the insured a portion of the premium, and pay the balance only to the insurer.<sup>74</sup> Nor can the broker recover the premium from the assured as money paid, unless he has actually paid it over to the underwriter.<sup>75</sup> And if a broker pays a premium contrary to the instructions of his principal, he cannot recover it from the insured.<sup>76</sup> Another case might be assumed where the principal would be liable to the agent for the premium, and that is, where he adopts a valid contract of insurance made by a voluntary agent, the latter having advanced the premium, but he may act upon the supposition that the

<sup>70</sup> 2 Kent's Commentaries, 5th ed., 41; Story on Partnership, pp. 150, 151, 158; 2 Duer on Insurance, ed. 1846, p. 98, sec. 4.

<sup>71</sup> Roberts v. Ogilby, 9 Price, 269.

<sup>72</sup> Ex parte Mather, 3 Ves. Jr. 373; Stackpole v. Earle, 2 Wils. 133.

<sup>73</sup> Dixon v. Hovill, 4 Bing. 665; 1 Moore & P. 656.

<sup>74</sup> Shee v. Clarkson, 12 East, 507.

<sup>75</sup> Arnould on Marine Insurance, Perkins' ed., 137, sec. 69; Dalzell v. Mulr. 1 Camp. 532 a; Power v. Butcher, 10 Barn. & C. 346.

<sup>76</sup> Shoemaker v. Smith, 2 Binn. (Pa.) 239.



agent has paid only the usual premium for similar risks, and may refuse to indemnify him for the excess.<sup>77</sup>

§ 699. **Set-off—Agent.**—Under the English decisions, a distinction has been made between the right to set off, under the statutes concerning setoff, and cases where the parties are insolvent; the object of the mutual credit clause under the bankruptcy statutes being held not to be to avoid cross-actions, but to do substantial justice between the parties;<sup>78</sup> that the latter extends to mutual credits, the former only to mutual debts; that is, ascertained and liquidated claims. Thus, unadjusted losses, in case of solvency, are not mutual debts, and cannot be set off against premiums by the broker, while in case of bankruptcy, they are mutual credits, and may be set off.<sup>79</sup> In considering these early English decisions on the question of setoff, consideration must also be given to the system of credits existing between the parties, and also to the fact that the broker is agent of both parties. In this country, the right to set off must depend upon statutory enactments.<sup>80</sup> An agent's right to a setoff, as against the assured, depends upon his having a lien of the policy, or having made advances on the credit thereof.<sup>81</sup> So, also, the agent's right to set off a loss may depend, it seems, upon not only such cases as where he has a lien upon the policy, but also upon the right to maintain an action in his own name.<sup>82</sup>

§ 700. **Same Subject—English Authorities.**—Where an agent was procured to effect insurances under an agreement to

<sup>77</sup> 2 Duer on Marine Insurance, ed. 1846, 188, et seq.

<sup>78</sup> Foster v. Wilson, 12 Mees. & W. 203, per Parke, J.

<sup>79</sup> Cumming v. Forester, 1 Maule & S. 494, per Lord Ellenborough; Gordon v. Browne, 2 Johns. (N. Y.) 150; Koster v. Eason, 2 Maule & S. 112; Grant v. Royal Exch. Co., 5 Maule & S. 439; 2 Duer on Marine Insurance, ed. 1846, 311, et seq., and cases cited; 1 Arnould on Marine Insurance, Perkins' ed. 115, et seq., and cases cited.

<sup>80</sup> See Gordon v. Browne, 2 Johns. (N. Y.) 155.

<sup>81</sup> Olive v. Smith, 5 Taunt. 56.

<sup>82</sup> 2 Duer on Marine Insurance, ed. 1846, 317. Right of company to setoff against commissions where the loss is sustained through agent's misconduct, Fudicker v. Guardian M. L. Ins. Co., 62 N. Y. 392.

reimburse himself for the premiums out of the freight, it was held that insurer could set off the premiums.<sup>83</sup> And where the underwriter becomes bankrupt, the right of the broker to apply premiums on hand to the satisfaction of claims of the assured against the underwriter ceases, as to all claims not antecedently adjusted, in the absence of an express or implied authority extending to payments or adjustments to be made subsequently to the bankruptcy, and the bankrupt having adjusted such claims with the broker prior to the bankruptcy, his assignees may recover from the broker the amounts due on policies subscribed to him prior to the bankruptcy, and not adjusted, nor can the broker in such case deduct premiums returnable from the underwriter on other policies;<sup>84</sup> but if the underwriter acknowledges the loss to a certain amount, so that it becomes a liquidated demand in the nature of an account stated, the broker may set off the loss as against premiums due from him,<sup>85</sup> although an agent may not have a right to setoff under the statute, yet if he has a lien on the policy, and the underwriter demands the premiums, he may set off the losses due against the premiums, provided the underwriter be solvent.<sup>86</sup> And in an action against the broker by the underwriter for premiums, the former may set off the amount due for return premiums on the same policies if his agency has not determined.<sup>87</sup> An adjustment allowing setoffs made between the broker and the underwriter binds the latter and his assignees in case of his bankruptcy.<sup>88</sup> Where the assured sent the policy to the broker to settle the losses and receive payments thereof from the underwriters, and one of the latter set off an account due him from the broker for premiums on other policies, and paid the balance in cash, it was held that the

<sup>83</sup> *Foy v. Bell*, 3 Taunt. 493.

<sup>84</sup> *Parker v. Smith*, 16 East, 381. See *Thompson v. Redman*, 11 534; *Minett v. Forester*, 4 Taunt. 541, note.

<sup>85</sup> *Wienholt v. Roberts*, 2 Camp. 586. See *Cumming v. Forrester*, 1 Maule & S. 497.

<sup>86</sup> *Parker v. Beasley*, 2 Maule & S. 423. See *Shée v. Clarkson*, 12 East, 507.

<sup>87</sup> *Shée v. Clarkson*, 12 East, 507.

<sup>88</sup> *Parker v. Smith*, 16 East, 381. See *Thompson v. Redman*, 11 Mees. & W. 490.

agents had no authority to receive the payment otherwise than in money, and that such setoff was not a payment of the loss, notwithstanding a usage at Lloyds to settle losses in this manner, for it was an attempt to pay the debt of one person with the money of another.<sup>89</sup> Although the agent has no lien upon the policy, he may yet have a right to a setoff for demands against the assured where the general law-merchant or usage or course of business between him and his principal warrants it.<sup>90</sup> And where a del credere agent has recovered judgment against the assured for his del credere commissions, the assured cannot set off, in reduction of the damages, losses not indemnified.<sup>91</sup> Nor can a del credere agent set off unadjusted losses against an action for premiums on policies generally in an action by the assignee of the bankrupt, where the policies are not in the agent's own name nor on account.<sup>92</sup> The fact that an agent is del credere gives no additional rights in this respect.<sup>93</sup>

**§ 701. Same Subject—English and American Authorities.**—Where the agent or a third party as surety, as in case of an indorser of a premium note, becomes liable to the underwriter for the premium, he is entitled to insist upon a credit or deduction for a return of premium. Such indorser is substituted for the assured in respect to the premium, and the

<sup>89</sup> Todd v. Reid, 4 Barn. & Ald. 210.

<sup>90</sup> See 2 Phillips on Marine Insurance, 3d ed., 561, sec. 1913.

<sup>91</sup> Caruthers v. Graham, 14 East, 578.

<sup>92</sup> Koster v. Eason, 2 Maule & S. 112. Contra, if policies are in his own name and on account; Id.; or if policies are in his own name though not on account: Id.

<sup>93</sup> See Moody v. Webster, 3 Pick. (Mass.) 424, per Putnam, J.; Peele v. Northcote, 7 Taunt. 478; Goldschmidt v. Lyon, 4 Taunt. 534; Moody v. Webster, 3 Pick. (Mass.) 424, per Putnam, J.; Grove v. Dubols, 1 Term Rep. 112, was probably the earliest case in which the right of setoff was discussed. Criticised in Hurlburt v. Pacific Ins. Co., 2 Sum. (C. C.) 481, per Story, J. Declared overruled in 2 Kent's Commentaries, 5th ed., 624, 625, note. See, also, 2 Duer on Marine Insurance, ed. 1846, 310, note, not overruled as to setoff where policy effected in agent's own name. For other English cases, see Wilson v. Creighton, 3 Doug. 132; Glennie v. Edmonds, 4 Taunt. 775; Davies v. Wilkinson, 6 L. J. Com. P. 121; Maans v. Henderson, 1 East, 335.

assured's liability, in regard to payment or rights in respect to return of premium, becomes the liability or right of the surety or agent.<sup>94</sup> Losses are a debt due from the underwriter to the assured, and not to the broker effecting the insurance, and the latter cannot set off losses due from the former in an action for premiums.<sup>95</sup> So it is held that where the loss is payable to the agent, the insurer cannot set off claims due from him alone, unless there be a lien in favor of the agent for the amount due on the policy. In this case it was held that the premium note could be deducted, whether made by the principal or agent;<sup>96</sup> and a third person who, by collecting and holding premiums, becomes the company's bailee, cannot apply the same to a discharge of debts due him by the agent.<sup>97</sup> But the fact that the insurer, a foreign company, has made an assignment, will not prevent its agent from making a setoff against indebtedness to the company for premiums collected and unearned premiums assigned to such agent by the owners of canceled policies made before official notice received by the agent of the assurer's assignment;<sup>98</sup> and money advanced by the company to its agent, to be a lien upon his commissions until paid, may be set off in an action for commissions by the agent.<sup>99</sup>

<sup>94</sup> See *Phoenix Ins. Co. v. Figuet*, 7 Johns. (N. Y.) 383; 2 Duer on Insurance, ed. 1846, 303, sec. 19, et seq.; 2 Phillips on Insurance, 3d ed., 570, 571, sec. 192d. Mr. Duer (*supra*) says: "It is implied in the engagement of the broker that he shall be answerable only for so much of the premium as shall be due when its payment is required"; but he adds that the agent's authority in such case would cease "when by act of either of the parties or by operation of law his mutual agency is determined," as in case of withdrawal of the policy from the broker's hands by the assured, or the bankruptcy or death of the underwriter. Mr. Phillips (*supra*) says: "In case of the agent or his surety being answerable for the premium, so long as it remains not paid by the assured to the agent, or the agent to the underwriter, the agent or his surety is liable only for the amount for which the assured would himself be liable if no agency were interposed."

<sup>95</sup> See *Wilson v. Creighton*, cited in 1 Marshall on Insurance, ed. 1810, 293; *Gordon v. Church*, 2 Caines (N. Y.), 299.

<sup>96</sup> *Hurlburt v. Pacific Ins. Co.*, 2 Sum. (C. C.) 173, 471. See opinion of Story, J.

<sup>97</sup> *Fagan v. North Missouri Ins. Co.*, 31 Ark. 54.

<sup>98</sup> *Franzen v. Hutchinson* (Iowa, 1895), 61 N. W. Rep. 698.

<sup>99</sup> *Johnson v. United States L. Ins. Co.*, (Mass. 1891), 27 N. E. Rep. 882.

And where a policy was effected in the name of A, on account "for whom it might concern," the loss payable to H., it was held that the insurer could not set off any account due him from H., other than that of the unpaid premium note.<sup>100</sup> And where policies were issued to a broker on account of "whom it might concern," loss payable to B., to whom the policies were sent, but afterward returned by him to the broker for collection, who then had knowledge that the vessels were owned by C., and B. was indebted at the time of the return of the policies to the broker in a large sum, it was held that the broker had no lien upon the policies, as there was none to revive, and could not set off B.'s indebtedness in an action by C. against the broker for an accounting.<sup>101</sup> But an agent authorized to collect a loss may settle by a setoff of mutual demands, and if the policy is canceled, the underwriters are discharged.<sup>102</sup> And an insurance agent authorized to "settle" a policy of insurance on the life of a deceased person, whose estate is insolvent has power to retain for a debt due from decedent to the company when the administrator offers to allow it.<sup>103</sup> Where a right of setoff against losses of sums due from several parties insured exists under the terms of the policy, what is due from all jointly may be set off, but what is due from each one must be set off against only his part of the loss.<sup>104</sup> But an agent's debt to the insurer cannot be set off against a loss, the policy being made to the agent on account of another, who is named, payable to the agent.<sup>105</sup> Where an agent effected insurance "for whom it might concern," in an action brought by the agent in his own name, for the benefit of the shipowners, it was held that debts due from the agent to the underwriters could not be setoff against the loss.<sup>106</sup> And although the insured has paid the amount of the premium note to an insurance broker, he must

<sup>100</sup> *Aldrick v. Equitable Safety Ins. Co.*, 1 Wood. & M. (C. C.) 272.

<sup>101</sup> *Sharp v. Whipple*, 1 Bosw. (N. Y.) 557. See *Pacific Mail Steamship Co. v. Great Western Ins. Co.*, 65 Barb. (N. Y.) 334.

<sup>102</sup> *Erick v. Johnson*, 6 Mass. 193.

<sup>103</sup> *Life Assn. v. Neville*, 72 Ala. 517.

<sup>104</sup> *Williams v. Ocean Ins. Co.*, 2 Met. (Mass.) 308.

<sup>105</sup> *Braden v. Louisiana State Ins. Co.*, 1 La. (O. S.) 220.

<sup>106</sup> *Hurlburt v. Pacific Ins. Co.*, 2 Sum. (C. C.) 471.

submit to its deduction from the insurance as provided in the policy in case of loss.<sup>107</sup> And the company may deduct the amount due on a premium or premium note from the loss ascertained.<sup>108</sup> And where an insurance broker obtained a policy "for whom it may concern, payable to Spurr," by authority of Spurr, and within notice of any other interest, and delivered the policies to Spurr, who notified him, on returning it for collection, that the entire interest was in the plaintiff, the broker cannot claim to hold the policy, as against the plaintiff, for a previous balance due from Spurr, nor for a balance due him from Spurr arising from transactions subsequent to such return. Nor, in a suit for retaining such policies against the broker, can he claim to deduct any general balance due him from Spurr.<sup>109</sup> And where an agent was directed by the master to procure insurance on his commissions, and the policy was effected by a broker, in the agent's name, it was held that he could not set off an indebtedness of the agent against the loss received by him.<sup>110</sup>

**§ 702. Agency—Attorney of Foreign Company.**—It is held in Wisconsin<sup>111</sup> that an attorney of a foreign insurance company, appointed in that state under a statutory provision,<sup>111a</sup> stands for all the purposes of his appointment for the corporation, and is possessed, as between him and the state, of all the powers of the corporation in the disposition of process and control of the actions thereby instituted.

**§ 703. Service of Papers or Process—Agent of Foreign Company.**<sup>112</sup>—A local secretary of a foreign mutual

<sup>107</sup> *Union Ins. Co. v. Grant*, 68 Me. 229.

<sup>108</sup> *Livermore v. Newbury Mar. Ins. Co.*, 2 Mass. 332. See *Phoenix Ins. Co. v. Figuet*, 7 Johns. (N. Y.) 383; *Warren v. Franklin Ins. Co.*, 104 Mass. 518.

<sup>109</sup> *Sharp v. Whipple*, 1 Bosw. (N. Y.) 357.

<sup>110</sup> *Foster v. Hoyt*, 2 Johns. Ch. (N. Y.) 327, where notice by the agent is not sufficient to defeat the right of the maker of the note to setoff. See *Tellou v. City Bank*, 9 Ind. 119.

<sup>111</sup> *State v. Doyle*, 40 Wis. 220.

<sup>111a</sup> Laws 1870, c. 56.

<sup>112</sup> See sec. 328, herein.

insurance company may be its agent for the service of papers.<sup>113</sup> And process may be served upon an agent of a corporation in any county, provided the president of the company does not reside in the county where the process was issued.<sup>114</sup> So a secretary of an association having a benefit department may be its agent under a statute providing who shall be agents of foreign companies for receiving service of process.<sup>115</sup> But where there is nothing in the original appointment of agents of an insurance company which binds the company to continue the agency for a specified time, the fact that the company, in compliance with an Illinois statute, designated from year to year such persons as its agents, on whom legal process may be served, does not imply any intention or agreement to continue the same persons as its agents for any special time, and such agency is revocable at will.<sup>116</sup> And the service of a summons on a traveling agent of an insurance company, or upon one authorized only to effect insurances, is not a valid service upon the company, under a statute permitting corporations to be sued in any county where they may "have an agency or transact business."<sup>117</sup> Nor can a claim by a resident of this state against a domestic fire insurance company be attached in a foreign state, by service on an agent of the company within the state.<sup>118</sup> A law passed after a loss on a policy by an insurance company of another state, and after the expiration of the policy making such companies liable to be sued in the state on insurances there, and providing for service on any agent of the company, can have no effect in a suit on the loss. Service in such suit on an agent not having authority to accept service or appear is invalid, and a judgment recovered on such services has no validity.<sup>119</sup> But a foreign

<sup>113</sup> *Southwestern Mut. B. Assn. v. Swenson*, 49 Kan. 449; 30 Pac. Rep. 405.

<sup>114</sup> *Peoria Ins. Co. v. Warner*, 28 Ill. 429.

<sup>115</sup> *Dixon v. Order of Railway Conductors of America*, 49 Fed. Rep. 910, under Rev. Stat. Wis., sec. 2637.

<sup>116</sup> *Davis v. Niagara F. Ins. Co.*, 11 Bliss. (C. C.) 165.

<sup>117</sup> *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422.

<sup>118</sup> *Douglass v. Phoenix Ins. Co.*, 63 Hun (N. Y.), 393; 43 N. Y. St. Rep. 309; 18 N. Y. Supp. 259.

<sup>119</sup> *Warren Mfg. Co. v. Etna Ins. Co.*, 2 Paine (C. C.), 501.

company cannot defeat the service of process on its agent, after a loss, by revoking his authority.<sup>120</sup>

**§ 704. Recovery Back of Loss Paid by Company's Agent.**

If the broker, according to a well-known course of dealing, pays over to the assured, or credits him on account with the loss he cannot recover it back from the assured on the ground of the underwriter's insolvency.<sup>121</sup> So where the agent having the money due on a loss in his possession pays it over promptly to his principal, he is not responsible therefor to the company, in the absence of knowledge or notice of an adverse claim, but the latter must look to the principal.<sup>122</sup> And if the underwriter pays the loss to the broker, he may recover it back thereafter upon discovery that the loss is not a valid one, or in case of mistake, where the broker has not paid it over to the assured, but only credited it to him on his account with the broker.<sup>123</sup> And "in case of payment by the underwriter to the agent of the assured through mistake, or for loss on a policy that is illegal as between the parties to it, where the agent is not a party to the illegality, the money may be recovered back if demanded in time."<sup>124</sup>

**§ 705. Action Against Receiver by Agent.**—An agent has no claim against the receiver of a company for breach of contract for services made with the company for a specified period, where the company suspends business by reason of an order of the court, at least where the company's fault is not proven to have occasioned the act of the superintendent of insurance in causing, through the attorney general and the court, such suspension.<sup>125</sup> Where receivers are appointed to close up

<sup>120</sup> *Michael v. Insurance Co. of Nashville*, 10 La. Ann. 737.

<sup>121</sup> *Edgar v. Bumpstead*, 1 Camp. 411; *Jameson v. Swainstone*, 2 Camp. 546.

<sup>122</sup> *Hooper v. Robinson*, 8 Otto (98 U. S.), 523.

<sup>123</sup> *Buller v. Harrison*, Cowp. 565.

<sup>124</sup> 2 *Phillips on Insurance*, 3d ed., 572, sec. 1929.

<sup>125</sup> *People v. Globe Mut. L. Ins. Co.*, 91 N. Y. 174. The court in this case said: "The state by the injunction order, operating alike upon the company and its agents, paralyzed the action of both the contracting parties, so that neither could perform or put the other in the



the company's affairs, and an injunction is issued restraining it from continuing business, except as to such matters as are necessary to continue its corporate character, choosing officers and laying such assessments as are necessary to pay its liabilities, the president, notwithstanding that prior to such acts of the court he was voted a fixed salary, can only recover a reasonable compensation for the services rendered by him.<sup>126</sup>

**§ 706. Action against Company by Average Adjusters.**  
In *Coas Wrecking Company v. Phoenix Company*<sup>127</sup> a vessel

wrong. Thereupon the company could not refuse, and did not refuse. To put it in the wrong, and make it liable for a breach, required action on the part of Mix. As a condition precedent he was bound to show both ability and readiness to perform on his part: *Shaw v. Republic L. Ins. Co.*, 66 N. Y. 292, 293; *James v. Burchell*, 82 N. Y. 113. He could do neither. Performance by him had become illegal. It would have been a criminal attempt, and possibly a misdemeanor. There could be neither readiness or ability to do the forbidden and unlawful acts: *Jones v. Knowles*, 30 Me. 402. So that from the necessity of the case, as there was no breach on either side before the injunction, so there could be none after. What had happened was a dissolution of the contract by the sovereign power of the state, rendering performance on either side impossible. And this result was within the contemplation of the parties, and must be deemed an unexpressed condition of their agreement. One party was a corporation. It drew its vitality from the grant of the state, and could only live by its permission. It existed within certain defined limitations, and must die whenever its creator so willed. The general agent who contracted with it, did so with knowledge of the statutory conditions, and these must be deemed to have permeated the agreement, and constituted elements of the obligation. . . . In the event of such corporate death, the motive of the state or the ground of its act is wholly immaterial. Its risk was upon the contractor, whatever its cause or occasion; and however it may have been provoked or induced, it must be deemed the act of the state, and not of the corporate body. And it is the independent act of the state; for although the reserve may have fallen below the prescribed level, a dissolution is not the necessary consequence that may follow or may not follow. The superintendent of insurance may make the certificate which sets the law in motion or may withhold it. The matter lies within his sole discretion and control. He may act or not, as he chooses; but if he does, it is his act, and not the company's, dependent wholly on his volition and not on that of the corporation; an independent agency, guided by its own motives, and not the act of the company producing its own death."

<sup>126</sup> *Commonwealth v. Eagle Ins. Co.*, 14 Allen (Mass.), 344. See, also, *Commonwealth Ins. Co. v. Crane*, 6 Met. (Mass.) 64.

<sup>127</sup> 7 Fed. Rep. 236.

was stranded and the voyage broken up, the cargo being transferred by sailors to a place of safety and there stored. Under an agreement there made between all the parties interested in the cargo and certain average adjusters, the latter received the cargo, sold a part, adjusted all claims, and made a statement and settlement with all parties, except an insurance company, to whom abandonment had been made of part of the cargo, which was refused. It was held that said adjusters' services were such as, in the absence of an agreement with them, could necessarily have been performed by the shipowners, and were maritime in character, and that the subject matter of the agreement being maritime, the contract was maritime, and that an action could be maintained on such contract in admiralty against the company for its proportion.<sup>128</sup>

**§ 707. Indictment of Agent for Larceny.**—An agent however general his authority, has no power to obtain from his own company insurance of a vessel known by him to be lost, and where he did so, and obtained the amount of the insurance from the company, and was indicted for larceny, it was held that the following charge to the jury was correct: "If the jury should find that the reinsurance alleged and charged in the indictment was effected after such loss, and that the defendant knew it, and that it was effected with intent and for the purpose of defrauding this company, in which the insurance was made for the benefit of one company in preference to another or for the agent's own benefit, or both with that intent or felonious intent, then the offense charged in the indictment would be made out; otherwise not."<sup>129</sup>

**§ 708. Action on Agent's Bond.**—Sureties on a bond executed to the company in pursuance of a contract between it and certain special agents are not liable for excess of moneys advanced the agents for commissions and expenses at the sureties' request, where the bond only provides for the faithful per-

<sup>128</sup> *Cutter v. Roe*, 7 How. (U. S.) 729; considered overruled by *Insurance Co. v. Dunham*, 11 Wall. (U. S.) 1. See *Gloucester Ins. Co. v. Young*, 2 Curt. (C. C.) 334.

<sup>129</sup> *People v. Dimick*, 107 N. Y. 13, 28; 41 Hun (N. Y.), 616.

formance of the contract, and an accounting and payment to the company of all balances and sums of money and other property due the company, and makes no provision concerning said advances.<sup>130</sup> And substantially the same decision has been made in New York, where the sureties were held not liable on a bond for failure of the agent to repay advancements made by the company to further the interest of the company in certain territory, said advances to remain a lien on the agent's business until repaid with interest, it appearing that the bond was conditioned for the discharge of his duties as agent, and for the payment over to the company of all moneys belonging to it. Such advancements are not, in such case, a claim for which the agent is personally liable.<sup>131</sup> But sureties are responsible for the money received by the treasurer of an insurance company where the charter creates the office, and the official bond is conditioned for the performance of his duties in accordance with the requirements, regulations, and restrictions of the charter.<sup>132</sup> They cannot, however, be held in an action on the bond for a premium which the agent had not received, but for which he had improperly given credit.<sup>133</sup> The company may sue on a bond given by the agent to the director,<sup>134</sup> but in case a bond be given to several companies by an agent acting for them, wherein the sureties are bound to each of them, a joint suit cannot be sustained thereon in case of a breach.<sup>135</sup> And in a debt on a penal bond, conditioned for the obligor's faithfulness in the discharge of his duties as secretary of an insurance company, a plea by the surety that the company had waived the tort and sued the principal in assumpsit for the amount of his embezzlements, and recovered judgment against him, is bad on demurrer.<sup>136</sup> The liability of a surety on a bond accrues from its date, although it was not delivered or accepted by the company until over a month there-

<sup>130</sup> *Burlington Ins. Co. v. Johnson*, 120 Ill. 622; 12 N. E. Rep. 205.

<sup>131</sup> *Northwestern Mut. L. Ins. Co. v. Mooney*, 108 N. Y. 118; 15 N. E. Rep. 308; 3 N. Y. (L. ed.) 608; 10 Cent. Rep. 488.

<sup>132</sup> *Portage Co. Mut. Ins. Co. v. Wetmore*, 17 Ohio, 330.

<sup>133</sup> *Byrne v. Aetna Ins. Co.*, 56 Ill. 321.

<sup>134</sup> *Bayley v. Onondago Ins. Co.*, 6 Hill (N. Y.), 476.

<sup>135</sup> *Germania F. Ins. Co. v. Hawks*, 55 Ga. 674.

<sup>136</sup> *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147.

after.<sup>137</sup> Where the obligors in a bond, one of whom was a surety only, bound themselves, their "heirs, executors, and administrators," and the surety died, and after his death a breach occurred, it was held that his estate was liable.<sup>138</sup> In another case the general agent gave a bond to cover the period of his agency, but about two months thereafter he gave a similar bond for one year, the liability thereunder being for defalcations during that time. This last bond provided for the apportionment of any loss in case the company held any other bond concurrently with it. The company had retained the first bond. It was held that as to a loss occurring during the period covered by the latter bond the sureties were liable for the total amount thereof, and that the two bonds were not concurrent.<sup>139</sup>

**§ 709. Same Subject—Laches of Principal—Notification of Sureties.**—The sureties on an agent's bond for faithful performance, according to the company's by-laws, are not discharged where the by-laws require a monthly accounting and paying over of moneys due, and the agent neglects, after paying regularly for a time, to pay over the balance until it exceeds the penal sum, although no notification thereof is given the sureties.<sup>140</sup> So in a recent case it appeared that an agent of a foreign insurance company neglected, without wrongful intent, to remit premiums within the time specified in the contract, and the company acquiesced in such action as a substantial compliance with the contract. The company did not notify the surety on the agent's bond providing for indemnity for loss caused by the agent's fraud or dishonesty. It

<sup>137</sup> *Ætna L. Ins. Co. v. American Surety Co.*, 34 Fed. Rep. 291.

<sup>138</sup> *Royal Ins. Co. v. Davies*, 40 Iowa, 469; 20 Am. Rep. 581. See, also, *Johnson v. Harvey*, 84 N. Y. 363; 38 Am. Rep. 515. As to insolvent company surety, see *Bedford Institution etc. v. Hathaway*, 134 Mass. 69; 45 Am. Rep. 289. The code of North Carolina, sec. 2094, gives the surety the right of action against his co-surety whenever the principal shall be insolvent. *Examine Getty v. Brusee*, 49 N. Y. 335; 10 Am. Rep. 379. Death of surety on joint obligation discharges his estate; same effect: *Wood v. Fisk*, 63 N. Y. 245; 20 Am. Rep. 528.

<sup>139</sup> *Ætna L. Ins. Co. v. American Surety Co.*, 34 Fed. Rep. 291.

<sup>140</sup> *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85; 41 Am. Rep. 196.

was a condition of the bond that any act of omission or commission by the agent, which might involve a loss for which the surety would be responsible under it, should be reported by the company to the surety. It was decided that the failure of the company to notify the surety of the agent's neglect was not a breach of the condition, and that there was no fraud in furnishing the surety with certificates that the agent had never been in arrears or default.<sup>141</sup> Nor does any obligation rest upon the company to notify sureties, in order to hold them, of the facts that the treasurer has intermingled its funds with his own, and used them with its knowledge, the bond having been subsequently executed by the sureties.<sup>142</sup> It is also held in Illinois that notice to the sureties of a defalcation of the principal is not necessary in order to charge them.<sup>143</sup> In another case a surety company, being applied to by a general agent of a life company to go upon his bond, obtained from the secretary of the company a certificate that the agent had faithfully performed his duties, and was not in arrears or default, and that his accounts, which were examined a few days prior to the date of the certificate, were then correct. In fact, the agent was then in the company's debt on a draft drawn three months prior thereto, although from certain correspondence between said agent and the company there was an inference that the debt had been paid at the date of the certificate. The examination referred to was not the company's annual examination which was made at a time of the year falling six months later, and it was its custom not to make an accurate investigation of its agent's accounts until that time. In an action against the surety company for a defalcation made subsequently to giving the certificate, it was held that the company was liable, and that there was no such laches on the part of the secretary as would release the defendant.<sup>144</sup>

**§ 710. Action on Agent's Bond--Prior Defaults.**—While the sureties on an agent's bond may be charged with

<sup>141</sup> *Pacific F. Ins. Co. v. Pacific Surety Co.*, 98 Cal. 7.

<sup>142</sup> *Screwman's B. Assn. v. Smith*, 70 Tex. 168; 7 S. W. Rep. 793.

<sup>143</sup> *Hough v. Aetna L. Ins. Co.*, 57 Ill. 318; 11 Am. Rep. 18.

<sup>144</sup> *Aetna L. Ins. Co. v. American Surety Co.*, 34 Fed. Rep. 291.

liabilities and defaults of the principal in the same month prior to its execution, where the custom requires that he account the first of every month for the business of the preceding month, yet they are not responsible for his acts preceding that time, and if remittances are made by the agent subsequently to the execution of the bond, they must be applied to arrearages for the month covered by its bond.<sup>145</sup> So one who, at the request of the principal and without the knowledge of the obligee, signs a bond for the principal's faithful conduct as an insurance agent, is not released by the principal's previous neglect in the same employment to make payments promptly, which were subsequently made good; nor by the obligee's continuing him in his employment after such default; and if the surety allows his name to remain, without protest, after learning of such default, he is liable in future.<sup>146</sup> In another case an agent at the time of executing the bond, was delinquent to the company by reason of past transactions, and remittances were subsequently made to the company by the agent under directions to apply them on account thereof, which was done. A bill was brought by the sureties to restrain the enforcement of a judgment against them, and for relief therefrom, on the ground that the remittances should be applied on account of defaults after the bond was given, as they were received from current business. This, together with the fact that the company had knowledge thereof, not being sufficiently proven, the bill was dismissed.<sup>147</sup> But a surety on the bond of the treasurer of a secret society, conditioned for the faithful application of the trust moneys, cannot evade liability for a misappropriation by the mere fact that the treasurer had misappropriated the trust funds in the preceding year, to the knowledge of the officers and members of the society, but not of the surety, and had been re-elected without any communication of such defalcation to the surety.<sup>148</sup> Where a treasurer is re-elected, reporting a certain sum of trust moneys in his hands from the preceding

<sup>145</sup> *British-American Assur. Co. v. Nell*, 76 Iowa, 645; 41 N. W. Rep. 382.

<sup>146</sup> *Home Ins. Co. v. Holway*, 55 Iowa, 571; 39 Am. Rep. 179.

<sup>147</sup> *Hecox v. Citizens' Ins. Co.*, 2 Fed. Rep. 535.

<sup>148</sup> *Roper v. Sangamon Lodge*, 91 Ill. 518; 33 Am. Rep. 60.

term, the sureties on his official bond for the new term must answer for any defalcation in that sum, and cannot throw the responsibility therefor on the sureties of the former bond.<sup>149</sup>

§ 711. **Action on Local Agent's Bond.**—The fact that a general agent settles with the company for premiums received by the local agent, whom he had appointed, and which the said local agent had not accounted for to him, does not discharge the sureties on a bond given the general agent, in the name of the company, conditioned that the local agent should pay over all moneys received by him. In such case the general agent is subrogated to the rights of the company.<sup>150</sup>

§ 712. **Action on Agent's Bond—Defenses.**—In an action on a bond given by the agent of an insurance company incorporated in another state, to recover moneys collected as premiums, it is a good defense that the plaintiff had not complied with the statutes of the state in appointing said agent, and that said agent had not qualified himself to act as such statutes required;<sup>151</sup> although under the Maine statute, requiring an annual license as a condition precedent to acting as such insurance agent, it was held that the burden of proof was on the defendants to show that the agent acted without a license.<sup>152</sup> And under an Ohio decision, the failure of the agent to comply with the statute requiring a certificate of authority from the state auditor constitutes no defense by the sureties on the bond.<sup>153</sup>

§ 713. **Actions Against Agents of Foreign Companies Acting Without License—Statutes.**—The statutes of certain states impose penalties upon persons acting therein as agents of foreign insurance companies without license or certifi-

<sup>149</sup> *Roper v. Sangamon Lodge*, 91 Ill. 518; 33 Am. Rep. 60.

<sup>150</sup> *Hough v. Aetna Ins. Co.*, 57 Ill. 318; 11 Am. Rep. 18.

<sup>151</sup> *Thorne v. Travelers' Ins. Co.*, 80 Pa. St. 15; 21 Am. Rep. 89.

<sup>152</sup> *Scottish Commercial Ins. Co. v. Plummer*, 70 Me. 540, under Me. Rev. Stat., c. 49, sec. 49.

<sup>153</sup> *Manhattan Ins. Co. v. Ellis*, 32 Ohio St. 388, under Ohio Stat., 222, sec. 21.

cate from the proper official, and such agent may, in such case, be indicted therefor.<sup>154</sup> And where a broker solicits and places insurances on behalf of a number of companies, and the premium is paid, the policies delivered, and the broker's commissions paid, but the assured did not select any of the companies, it was held that such acts of the agent not having been authorized under the statute, the agent was liable as for separate offenses, he being the agent of the several companies for whom he had solicited.<sup>155</sup> An information for acting as agent of a company, which has not complied with the laws of the state, is insufficient if it does not allege that such corporation was an insurance company.<sup>156</sup> If no unincorporated company can procure from the insurance commissioner a license for the transaction of business in a certain state under its statutes, a voluntary association of guarantee and accident Lloyds cannot be licensed to transact business, but the penalty prescribed is not applicable to such association, and a person assisting it as its agent in transacting business is guilty of no offense.<sup>157</sup> In an action for penalties brought against an agent for a foreign insurance company, the term "agent" being made by the statute to include any person aiding in "transacting the insurance business of a foreign corporation," it is error to direct a verdict for the defendant because the evidence does not show an agency in the

<sup>154</sup> See *State v. Johnson*, 43 Minn. 350; 45 N. W. Rep. 711. Indictment under Minn. Gen. Stat. 1878, sec. 292, c. 34; amended, c. 54, holding that it is immaterial, as to the agent, whether the company had or had not complied with the statute: See *Morton v. Hart* (Tenn.), 12 S. W. Rep. 1026; 19 Ins. L. J. 347; *State v. Hover*, 58 Vt. 496; *State v. Turney*, 81 Ind. 559; *Moses v. State*, 65 Miss. 56; *Ithaca etc. v. Beecher*, 99 N. Y. 429. The statutes of certain states impose a personal liability upon agents, in favor of assured, where the foreign company is not authorized to transact business in the state: See Ala. Code, 1893, secs. 20, 23; Conn. Pub. Acts, 1889, c. 107; Pa. Act, May 1, 1876; Pub. Laws, 53 Tenn. Act, Feb. 27, 1891; Tex. Acts, 1879, c. 36; Vt. Gen. Laws, 1893, sec. 14. And see as to requirements and liabilities of agents in New York, Hamilton's Stat. Rev. of Ins. Laws. 1894, secs. 50, 54, 91, 111, 134, 137. As to Pa. Act, see *McBride v. Rinard*, 15 Pa. Co. Ct. 422.

<sup>155</sup> *State v. Farmer*, 49 Wis. 459.

<sup>156</sup> *Brown v. State*, 26 Tex. App. 540; 10 S. W. Rep. 112.

<sup>157</sup> *Fort v. State*, 92 Ga. 8; 18 S. E. Rep. 14.



ordinary sense of that term.<sup>158</sup> But where the defendant, in a similar case, filled out a blank application, assuming to act for a certain insurance company, and a policy was issued thereon by the company, it was held that such evidence fairly tended to establish an agency.<sup>159</sup> Where the statute includes any person "who inspects any risks" for an unlicensed foreign corporation, this will not apply to the act of inspecting a risk previously taken, so as to enable an action to be maintained for penalties.<sup>160</sup> And if a foreign corporation has been prohibited from doing business therein, the resident agent, and not the company, is liable for issuing policies thereafter.<sup>161</sup> It has been held in Louisiana that an insurance agent is liable for the license exacted by statute from a firm or person doing an insurance business in that state, and that such agent stands between the insured and the company.<sup>162</sup> In a later case, however, in the same state, it was held that under its statute it was not within the power of the legislature to compel an agent to pay the license required of a foreign corporation.<sup>163</sup> It is competent for the legislature to enact such statutes.<sup>164</sup> And it is declared in Michigan that agents of mutual companies are equally as liable as those of stock companies, where he has not obtained the proper authority to solicit for the foreign company;<sup>165</sup> so also in Wisconsin.<sup>166</sup> And the word "state," under a statute<sup>167</sup> prohibiting agents of companies incorporated in

<sup>158</sup> *People v. People's Ins. Exch.*, 126 Ill. 406; 18 N. E. Rep. 774, under Act Ill., March 11, 1869, p. 22. See *People v. Fessler*, 145 Ill. 150; 34 N. E. Rep. 146.

<sup>159</sup> *People v. Howard*, 50 Mich. 239, under Mich. Acts, 1891, No. 148.

<sup>160</sup> *Ex parte Robinson*, 86 Ala. 622; 5 S. Rep. 827, under Code Ala., secs. 1205, 3897. See *Noble v. Mitchell* (Ala. 1894), 14 S. Rep. 581.

<sup>161</sup> *State v. Charter Oak L. Ins. Co.*, 9 Mo. App. 364. See *State ex rel. v. New York L. Ins. Co.*, 81 Mo. 89; 10 Mo. App. 580.

<sup>162</sup> *State v. Woods*, 40 La. Ann. 175; 3 S. Rep. 543.

<sup>163</sup> *State v. Williams*, 46 La. Ann. 922; 15 S. Rep. 290; 23 Ins. L. J. 508.

<sup>164</sup> *Pierce v. People*, 106 Ill. 11; 46 Am. Rep. 683.

<sup>165</sup> *People v. Howard*, 50 Mich. 239.

<sup>166</sup> *Zell v. Hermann Farmers' Mut. Ins. Co.*, 75 Wis. 521; 44 N. W. Rep. 828.

<sup>167</sup> Rev. Stat. Ind. 1881, p. 240, subd. 7, secs. 3765, 3771.

other states from transacting business in Indiana without a license, includes the District of Columbia and the territories.<sup>168</sup>

**§ 714. When Agent's Right May not be Abridged though Acting for Unlicensed Company.**—A professional adjuster, open to employment by any and all companies who may need him, has such a legal business and profession as gives him a right, guaranteed by the constitution of the United States, to follow it in any state, without abridgment or restriction by a state law imposing a penalty upon agents of foreign companies unlicensed in the state.<sup>169</sup>

**§ 715. Indictment of Agent for Paying Rebate—Statute.**—Where an agent was indicted under the New York statute<sup>170</sup> for paying a rebate as an inducement to a person to take a life policy, it was held immaterial whether the corporation was a domestic or foreign company, and that it appearing that the company was doing business in New York, it sufficiently supported an allegation that it was organized under the laws of another state. The statute, however, only prohibited discriminations in rates by "life insurance companies doing business in this state."<sup>171</sup>

**§ 716. Reformation of Policy for Agent's Mistakes, etc.**—Where an agent is authorized to act in the premises, and through his mistake or fraud the policy fails to express the real contract between the parties, or if by inadvertence or mistake of the agent provisions other than those intended are inserted, or stipulated provisions are omitted, there is no doubt as to the power of a court of equity to grant relief by a reformation of the contract. When, however, a mistake is relied on, it must be mutual to warrant such intervention, or

<sup>168</sup> *State v. Briggs*, 116 Ind. 55; 18 N. E. Rep. 395.

<sup>169</sup> *French v. People* (Colo. 1895), 24 Ins. L. J. 678; 40 Pac. Rep. 463. But see *Hooper v. People State Cal.* (U. S. S. C. 1895), 15 Supr. Ct. Rep. 207; 40 Cent. L. J. 228. Three justices dissented in this last case.

<sup>170</sup> N. Y. Laws, 1889, c. 282, sec. 100; Amended Laws, 1890, c. 401.

<sup>171</sup> *People v. Formosa*, 131 N. Y. 478; 43 N. Y. St. Rep. 654. *Examine People v. McCann*, 67 N. Y. 506.

there must be mistake of one party and fraud of the other.<sup>172</sup> There are also other exceptions to the rule that the mistake must be mutual.<sup>173</sup> And a contract may also be reformed for a mutual mistake as to the law, and such mistake may even be corrected by the beneficiary after the death of the insured.<sup>174</sup> And where the company's agent agrees to insure for the benefit and protection of the owner, and the consideration is paid, but the policy, as written by the agent, does not conform to the agreement, the policy will be reformed to express the real contract.<sup>175</sup> And where through the fault of the company's agent in giving wrong information the policy was issued in the name of the mortgagor, instead of the mortgagee, relief will be granted in equity.<sup>176</sup> And the policy will be reformed where, by mistake as to the manner of properly filling in the papers, the agents of the company, with full knowledge of the facts, made the policy in the wrong name, so that it failed to cover the insured's interest as mortgagee.<sup>177</sup> So where it appears that the agreement was for a policy for one year, and the agent by mistake drew it up for a term of sixty days, and the insured paid the premium usually paid for a policy for one year on that class of risks, equity will reform the contract.<sup>178</sup> And so where a policy clerk made a similar mistake as to the duration of the policy, it was reformed, and a suit at law which had been brought upon it, was enjoined.<sup>179</sup> So where the agent fails, through fraud or mistake, to rightly state the facts when he

<sup>172</sup> *Abraham v. North German Ins. Co.*, 40 Fed. Rep. 717; *Kent v. Manchester*, 29 Barb. (N. Y.) 595; *Cooper v. Farmers' Ins. Co.*, 50 Pa. St. 299; *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465; *Bailey v. American Cent. Ins. Co.*, 13 Fed. Rep. 250; *Phoenix Ins. Co. v. Hoffheimer*, 46 Miss. 645; *Ledyard v. Hartford F. Ins. Co.*, 24 Wis. 496; *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *National Traders' Bank v. Ocean Ins. Co.*, 62 Me. 519; *Devereux v. Sun Fire Office*, 51 Hun (N. Y.), 147.

<sup>173</sup> *National Traders' Bank v. Ocean Ins. Co.*, 62 Me. 519, 523.

<sup>174</sup> *Welch v. Welch* (Ky. Sup. Ct. 1892), 13 Ky. L. Rep. 639.

<sup>175</sup> *Abraham v. North German Ins. Co.* (Iowa), 40 Fed. Rep. 717.

<sup>176</sup> *Sias v. Roger Williams Ins. Co.*, 8 Fed. Rep. 183.

<sup>177</sup> *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517.

<sup>178</sup> *Devereux v. Sun Fire Office*, 4 N. Y. Supp. 655; 51 Hun (N. Y.), 147.

<sup>179</sup> *North American Ins. Co. v. Whipple*, 2 Biss. (C. C.) 418.

fills up the application, the policy will be reformed in equity;<sup>180</sup> and if the company's officers have knowledge of and intend to cover the entire interest in the property as agreed, the policy will be reformed to conform with the intent of the parties.<sup>181</sup> And equity may reform the contract where the facts, as stated to the agent, are wrongly written in by him, in case there is no fraud or collusion between the agent and the assured.<sup>182</sup> So where the agent of the assured, having insured goods in his own name as agent, and the policy having expired a new one was written, making by the mistake the policy in the agent's own name, but not as agent, the policy will be reformed by inserting the word "agent."<sup>183</sup> And where the plaintiff applied to an agent for insurance to cover the interest of herself and son in the property, and the agent omitted all reference to the son's interest in writing the application, and she, being illiterate and relying upon the agent, signed the same, it was held that equity would reform the policy to cover both interests as intended.<sup>184</sup> And where the agent was to select the companies, and the policies were to allow additional insurance, and the agent wrote a policy forbidding additional insurance, it was held that it would be reformed, and this even though the assured had accepted the policy without reading it.<sup>185</sup> So if the local agent's attention is called by the insured to an error in describing the premises after the policy is issued, and the agent tells him that it makes no difference, and thereafter the general agent and secretary of the company, with knowledge of the facts, inspects the premises and declares the risk good, the policy may be reformed.<sup>186</sup> And upon trial of an action on the policy the insured, without any plea of mistake or fraud, may have corrected a statement in the proofs of loss, by showing fraud or mistake on the agent's part in transcribing the

<sup>180</sup> *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212.

<sup>181</sup> *Keith v. Globe Ins. Co.*, 52 Ill. 518.

<sup>182</sup> *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568.

<sup>183</sup> *Phoenix etc. Ins. Co. v. Hoffhelmer*, 46 Miss. 645.

<sup>184</sup> *Jemison v. State Ins. Co.*, 85 Iowa, 229; 52 N. W. Rep. 185.

<sup>185</sup> *Barnes v. Hekla F. Ins. Co.*, 75 Iowa, 11; 39 N. W. Rep. 122 (annotated case).

<sup>186</sup> *Maher v. Hibernia Ins. Co.*, 67 N. Y. 290

same.<sup>187</sup> So a policy may be reformed, even after loss, where the company's agent who drafted the application made a mistake in describing the buildings, and so notwithstanding the company had, at the time the policy was taken out, insured other buildings in the same block to the full amount allowed by the rules to be taken thereon.<sup>188</sup> So equity will reform the contract where the insured is induced by the agent of the company to take out a policy on firm property in his own name, under the belief that it would protect the partnership interest.<sup>189</sup> In another case it appeared that plaintiff was the assignee of a certain mortgage, and also claimed possession of the property as a purchaser under the execution sale of the premises. One M. was also in possession of the property, claiming ownership, and the title was in litigation. The company's agent knew of the pendency of said suit, and suggested to the plaintiff, when effecting insurance, to take the policy in the name of M., payable to the mortgagee, which was done. Plaintiff obtained a judgment in her favor, and a loss having occurred, the company refused payment of the loss, claiming that M. was not the owner when the insurance was made. It was held that equity would grant relief by inserting plaintiff's name in the place of M.'s in the policy, and would compel payment to her.<sup>190</sup> And in case the policy as issued does not conform to the agreement as made with the agent, in regard to the date of sailing, and the agent, before delivery, alters said date of sailing, it will be reformed.<sup>191</sup> So where a mortgagee states his interest as such to the agent, but the latter wrongly draws up the application in the mortgagor's name payable to the mortgagee, so as to cover the property, it will be reformed.<sup>192</sup> And where, by mistake of the insurance broker, a policy was effected in his name on

<sup>187</sup> *Zielke v. London Assur. Corp.*, 64 Wis. 442.

<sup>188</sup> *Home Ins. Co. v. Lewis*, 48 Tex. 622.

<sup>189</sup> *Snell v. Insurance Co.*, 98 U. S. 85.

<sup>190</sup> *Balen v. Hanover F. Ins. Co.*, 67 Mich. 179; 34 N. W. Rep. 654 (annotated case).

<sup>191</sup> *Buntin v. Orient Mut. Ins. Co.*, 41 N. Y. (2 Keyes) 667; 8 Bosw. (N. Y.) 448; 1 Abb. App. Dec. (N. Y.) 257.

<sup>192</sup> *Woodbury Savings Bank v. Charter Oak etc. Ins. Co.*, 31 Conn. 517.

account of the wrong person, the policy may be reformed so as to cover the interest of the person actually owning the property, and who directed the broker to procure the policy.<sup>193</sup> But where an agreement made with the agent is not one which he has authority to make, and its terms are not communicated to or adopted by the principal, and is not a binding contract upon the parties, there can be no reformation of the policy.<sup>194</sup> And the policy will not be reformed so as to permit other insurance, notwithstanding an agreement with the insurer's agent that the policy should so do, unless it is clearly proven that the intention was mutual between the parties.<sup>195</sup> It is also held that if the policy provides that the survey shall be part of the policy and a warranty, then the agent's mistake in transcribing the answers of the assured will not warrant a reformation of the policy, unless it is shown that the risk was not accepted on the faith of the warranty.<sup>196</sup> Nor is the fact that the agent was mistaken sufficient ground for relief where the mistake is not mutual, and the agent was not authorized to make the contract for the insurer.<sup>197</sup> But the proof must be clear, for if a doubt exists as to what statements the applicant actually made, or as to the intent of the parties, or if the evidence be materially conflicting, a reformation will not be granted.<sup>198</sup>

**§ 717. Agent's Defenses.**—In an action against the agent or broker for negligence or unskillfulness, the plaintiff is entitled to recover the same amount as he might have re-

<sup>193</sup> *Oliver v. Mutual Commercial M. Ins. Co.*, 2 Curt. (C. C.) 277; citing *Motteux v. London Assur. Co.*, 1 Ark. 545; *Collett v. Morrison*, 9 Hare, 162; *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige (N. Y.), 278.

<sup>194</sup> *Fowler v. Scottish Equitable L. Assur. Co.*, 4 Jur. (N. S.) 1169; 28 L. J. Ch. 225.

<sup>195</sup> *Fellows v. Madison Ins. Co.*, 2 Disn. (Ohio) 128.

<sup>196</sup> *Cox v. Aetna Ins. Co.*, 29 Ind. 586.

<sup>197</sup> *Cooper v. Farmers' Mut. F. Ins. Co.*, 50 Pa. St. 299.

<sup>198</sup> *Cooper v. Farmers' Mut. F. Ins. Co.*, 50 Pa. St. 299; *Farmville Ins. etc. Co. v. Butter*, 55 Md. 233; *Snell v. Atlantic F. Ins. Co.*, 98 U. S. 85; *McHugh v. Imperial F. Ins. Co.*, 48 How. Pr. (N. Y.) 230; *Mead v. Westchester F. Ins. Co.*, 64 N. Y. 453; *Parsons v. Bignold*, 15 L. J. Ch. 379; 13 Sim. 518; *Tusson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33; *Balen v. Hanover F. Ins. Co.*, 67 Mich. 179; *Hearne v. Marine Ins. Co.*, 20 Wall. (U. S.) 488; *St. Paul F. Ins. Co. v. Shaver*, 76 Iowa, 282.

covered against the underwriters had the policy been properly effected, and in such case the agent may avail himself of every defense, such as fraud, noncompliance with the warranty, etc., which the underwriters themselves might have set up in an action on the policy.<sup>199</sup>

**§ 718. Proof of Agent's Authority.**—The burden of proof of the original authority of the agent, or the subsequent ratification of his contract, rests upon the party who relies upon his acts.<sup>200</sup> So the burden is upon the assured to show that the agent's acts were within the apparent scope of his authority.<sup>201</sup> So the burden of showing that the agent possessed the power to waive conditions is upon the assured.<sup>202</sup> In the case of officers of a corporation, there are certain acts which parties have a right to assume that they are authorized to do, and as to such acts, it would seem that it is not necessary to show affirmatively their authority.<sup>203</sup> An agent's authority may be proven by his written commission,<sup>204</sup> by producing his power of attorney, or by putting in evidence the resolution of the board of directors appointing him,<sup>205</sup> and the character of the agency may be shown by the document appointing him.<sup>206</sup> So ratification is proof of authority.<sup>207</sup> His authority may also be proven by showing a custom of the company to pay policies subscribed by him as agent, even though he has a power of at-

<sup>199</sup> 1 Marshall on Marine Insurance, ed. 1810, 301; *Miner v. Tagert*, 12 Mass. 40; *Webster v. De Tastet*, 7 Term Rep. 157; *Alsop v. Coit*, 12 Mass. 40; *Wilkinson v. Coverdale*, 1 Esp. 75, per Lord Kenyon; *De-laney v. Stoddart*, 1 Term Rep. 22.

<sup>200</sup> *Wolff v. Horncastle*, 1 Bos. & P. 316; *Fleming v. Hartford F. Ins. Co.*, 42 Wis. 616; *Lamen v. Loring*, 1 Mason (C. C.), 128; *Russell v. Union Ins. Co.*, 4 Dall. (C. C.) 421; *Sterling v. Vaughn*, 11 East, 619; 2 Camp. 225; *Foster v. United States Ins. Co.*, 11 Pick. (Mass.) 85.

<sup>201</sup> *Sohnes v. Insurance Co. of North America*, 121 Mass. 438.

<sup>202</sup> *Messelbach v. Sun Fire Office*, 122 N. Y. 578; 26 N. E. Rep. 34.

<sup>203</sup> *Safford v. Wickoff*, 4 Hill (N. Y.), 442, per Walworth, C. See *Jellingshams v. New York Ins. Co.*, 6 Duer (N. Y.), 1.

<sup>204</sup> *Howard Ins. Co. v. Owen* (Ky. Sup. Ct. 1891), 13 Ky. L. Rep. 237.

<sup>205</sup> *Bennighoff v. Agricultural Ins. Co.*, 93 N. Y. 495.

<sup>206</sup> *Martin v. Farmers' Ins. Co. etc.*, 84 Iowa, 516; 51 N. W. Rep. 20.

<sup>207</sup> *Fayles v. National Ins. Co.*, 49 Mo. 380.

torney.<sup>208</sup> So an agent's authority may be affected by usage.<sup>209</sup> So an agent's authority to act concerning the loss may be proven by the fact that he was authorized to aid in adjusting the loss.<sup>210</sup> So the practice of the company in allowing its agents to do certain acts is admissible on the question of their authority to waive conditions of the policy.<sup>211</sup> So the charter and by-laws are admissible on the question of the agent's authority to waive forfeiture,<sup>212</sup> and his authority may be proven by evidence of his acts in receiving and forwarding the application.<sup>213</sup> So the receiving by the company of the application through an agent, and issuing a policy thereon, establishes an agency.<sup>214</sup> Correspondence between insurance brokers and the company is admissible to show their relations with each other and methods of doing business.<sup>215</sup> An agent's authority cannot be proven by his declarations,<sup>216</sup> nor by general reputation,<sup>217</sup> and if an agent gives a note for the premium, evidence is inadmissible to show that he meant to bind his principal, and not himself;<sup>218</sup> and where an agent of the company was requested to look after the insured's risks in certain companies, and he reported lists to him showing the amount of his insurances, and gave receipts for advances for premiums, such papers were held inadmissible to show a recognition by the company of the policies sued on.<sup>219</sup>

**§ 719. Termination of Agency—War.**—There are numerous cases which hold that the late Civil War did not revoke the

<sup>208</sup> *Haughton v. Ewhank*, 4 Camp. 88.

<sup>209</sup> *Whitehouse v. Moore*, 18 Abb. (N. Y.) 142.

<sup>210</sup> *Powers' Dry Goods Co. v. Imperial F. Ins. Co.*, 48 Minn. 380; 51 N. W. Rep. 123.

<sup>211</sup> *Knickerbocker L. Ins. Co. v. Norton*, 96 U. S. 234, per Bradley, J.

<sup>212</sup> *Koelges v. Guardian etc. Ins. Co.*, 2 Lans. (N. Y.) 480.

<sup>213</sup> *Capital City Ins. Co. v. Caldwell*, 95 Ala. 77; 10 S. Rep. 355.

<sup>214</sup> *Packard v. Dorchester Mut. F. Ins. Co.*, 77 Me. 144.

<sup>215</sup> *Sun Mut. Ins. Co. v. Saginaw Barrel Co.*, 114 Ill. 90; 29 N. E. Rep. 477.

<sup>216</sup> *James v. Stookey*, 1 Wash. (C. C.) 330.

<sup>217</sup> *Graves v. Horton*, 38 Minn. 66; 35 N. W. Rep. 568.

<sup>218</sup> *Stackpole v. Arnold*, 11 Mass. 29.

<sup>219</sup> *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502.



authority of an agent, resident in the enemy's country, to receive premiums in behalf of the company,<sup>220</sup> although other cases hold that the agency is suspended.<sup>221</sup> But the agency of a subject of a neutral power is not revoked by war, the agent being a resident in the enemy's country.<sup>222</sup>

§ 720. **Termination of Agency as to Assured.**—An agency for the assured may terminate by the performance of the act for the doing of which the agency was created, as in case of the employment of a broker to procure a particular insurance, his agency ceases when that insurance is effected.<sup>223</sup> So an agent's authority to insure may be revoked at any time prior to the actual completion of the contract with the underwriters, and being so revoked, he acts on his own responsibility thereafter if he proceeds.<sup>224</sup> If an agent insures "for whom it may concern," and his authority is revoked, he cannot sue in his own name, unless he has some lien on or interest in the property.<sup>225</sup> So insolvency or bankruptcy of the principal revokes the agent's authority.<sup>226</sup> And under the English

<sup>220</sup> *Robinson v. International L. Assn.*, 42 N. Y. 547; 1 Am. Rep. 490; *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614; 3 Am. Rep. 218; *Sands v. New York L. Ins. Co.* (N. Y. Sup. Ct. 1871), 4 Alb. L. J. 11; *Statham v. New York etc. Ins. Co.*, 45 Miss. 581; *Hancock v. New York L. Ins. Co.*, 11 Fed. Cas. 402; 2 Ins. L. J. 903; *Ward v. Smith*, 7 Wall. (U. S.) 447. But see *Howell v. Gordon*, 40 Ga. 302; *Insurance Co. v. Davis*, 5 Otto (95 U. S.), 425.

<sup>221</sup> *Cohen v. New York Mut. L. Ins. Co.*, 50 N. Y. 610. See *Ward v. Smith*, 7 Wall. (U. S.) 447.

<sup>222</sup> *Martine v. International L. Assur. Soc. of London*, 62 Barb. (N. Y.) 181; *Robinson v. International L. Assur. Co.*, 42 N. Y. 54; 1 Am. Rep. 590.

<sup>223</sup> *Kehler v. New Orleans Ins. Co.*, 23 Fed. Rep. 709; *Franklin Ins. Co. v. Sears*, 21 Fed. Rep. 290.

<sup>224</sup> *Warwick v. Slade*, 3 Camp. 127. See 2 Duer on Insurance, ed. 1846, 116, sec. 13, where this case is denied as an authority upon the point as to the right to revoke and prevent a recovery of premiums advanced after the underwriters had signed the slip or memorandum. The case, however, turned upon the point that the slip was unstamped when signed.

<sup>225</sup> *Reed v. Pacific Ins. Co.*, 1 Met. (Mass.) 168.

<sup>226</sup> *Parker v. Smith*, 16 East, 383.

cases, where the broker is by usage the agent of both parties, the bankruptcy or death of the underwriter revokes his authority as to the former.<sup>227</sup> Duer instances a case, under a given form of policy, where the direction to insure being once given, it is irrevocable in its nature, as where a custom exists of merchants to cover all their shipments by a general standing time policy on goods, the terms of which embrace all outward and homeward shipments on their own account, and all shipments to them "from foreign ports upon which they are directed to effect insurance."<sup>228</sup>

**§ 721. Termination of Agency as to Assurer—Revocation.**—The company may revoke its agent's authority, and such revocation binds third parties having knowledge, express or implied, thereof, and, in such case, they deal with him at their peril.<sup>229</sup> And no right is vested in an agent to hold an agency until the end of the year, by reason of the fact that he has taken out an annual license.<sup>230</sup> Nor does the fact that an agent has right to commissions on renewal policies render the agency an agency coupled with an interest, so as to prevent the termination of the agency by the company at its will.<sup>231</sup> So where an agent has ceased to do business for the company, he cannot, without special permission, and without any indorsement or consent on the policy, waive a condition as to other insurance, and if such agent procures other insurance in another company, the first policy is avoided.<sup>232</sup> And notice of other insurance is not sufficient when given to one whose agency has long ceased.<sup>233</sup> An agency may be terminated by the company ceasing to carry on business,<sup>234</sup> and where the

<sup>227</sup> *Parker v. Smith*, 16 East, 382; *Houston v. Robertson*, 6 Taunt. 448.

<sup>228</sup> 2 Duer on Insurance, ed. 1845, 116-20, sec. 13.

<sup>229</sup> *McNeille v. Continental Ins. Co.*, 66 N. Y. 23.

<sup>230</sup> *Davis v. Niagara F. Ins. Co.*, 12 Fed. Rep. 281; 11 Biss. (C. C.) 592.

<sup>231</sup> *Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843. See *Newcomb v. Imperial L. Ins. Co.*, 51 Fed. Rep. 751, which this case distinguishes.

<sup>232</sup> *Hess v. Washington F. & M. Ins. Co.*, 83 N. Y. St. Rep. 730; 11 N. Y. Supp. 299.

<sup>233</sup> *Illinois Mut. F. Ins. Co. v. Malloy*, 50 Ill. 419.

<sup>234</sup> *Insurance Co. v. Williams*, 91 N. C. 69.

agency of an insurance company was given to a firm, and they had authority to receive payment of premiums upon policies issued by the company, it was held that the death of one partner terminated the agency, and the insured having notice of such death, payment of premiums to the survivor were not valid as against the company;<sup>235</sup> for where the insured has been accustomed to pay the premiums due on his policy at a certain agency, and the agent has been removed or ceases to act, it is incumbent upon the insurance company to notify the insured of the fact.<sup>236</sup> And so far as the assured is concerned, the notice of revocation must be explicit, especially where he has been in the habit of dealing with such agent, as in case he has been paying premiums to him.<sup>237</sup> Unless the insured has notice of the termination of the agency, he may presume that the agent's authority still continues.<sup>238</sup> If the insured has no notice of the revocation of the agency, or that the agent has ceased to act, the company cannot insist upon a forfeiture for nonpayment on the day named, when such nonpayment is caused by the removal or termination of the agency, and there has been no notice to pay elsewhere,<sup>239</sup> and the insured has a reasonable time in which to make payment.<sup>240</sup> So notice of loss, when required to be given to some agent of the company, is sufficient when given to a local agent, although that branch of the company's business had been transferred. It appeared, however, that such agent reported such notice to the transferee.<sup>241</sup> A provision specifying certain grounds upon which

<sup>235</sup> *Martine v. International etc. Assur. Soc.*, 5 Lans. (N. Y.) 535; 62 Barb. (N. Y.) 181. See *Hartford Ins. Co. v. Wilcox*, 57 Ill. 180.

<sup>236</sup> *Briggs v. National L. Ins. Co.*, 11 Fed. Rep. 458; *Braswell v. American L. Ins. Co.*, 75 N. C. 8; *Insurance Co. v. Eggleston*, 96 U. S. 572.

<sup>237</sup> *McNelley v. Continental Ins. Co.*, 66 N. Y. 231, per Andrews, J.

<sup>238</sup> *Marshall v. Reading F. Ins. Co.*, 78 Hun (N. Y.), 83; 60 N. Y. St. Rep. 820; 29 N. Y. Supp. 334; *Stunk v. Firemen's Ins. Co. of Chicago*, 160 Pa. St. 345; 28 Atl. Rep. 779; 23 Ins. L. J. 477.

<sup>239</sup> *Insurance Co. v. Eggleston*, 96 U. S. 572; *Braswell v. American L. Ins. Co.*, 75 N. C. 8.

<sup>240</sup> *Lamens v. Northwestern Mut. L. Ins. Co.*, 1 McCrary (C. C.), 508; 3 Fed. Rep. 325.

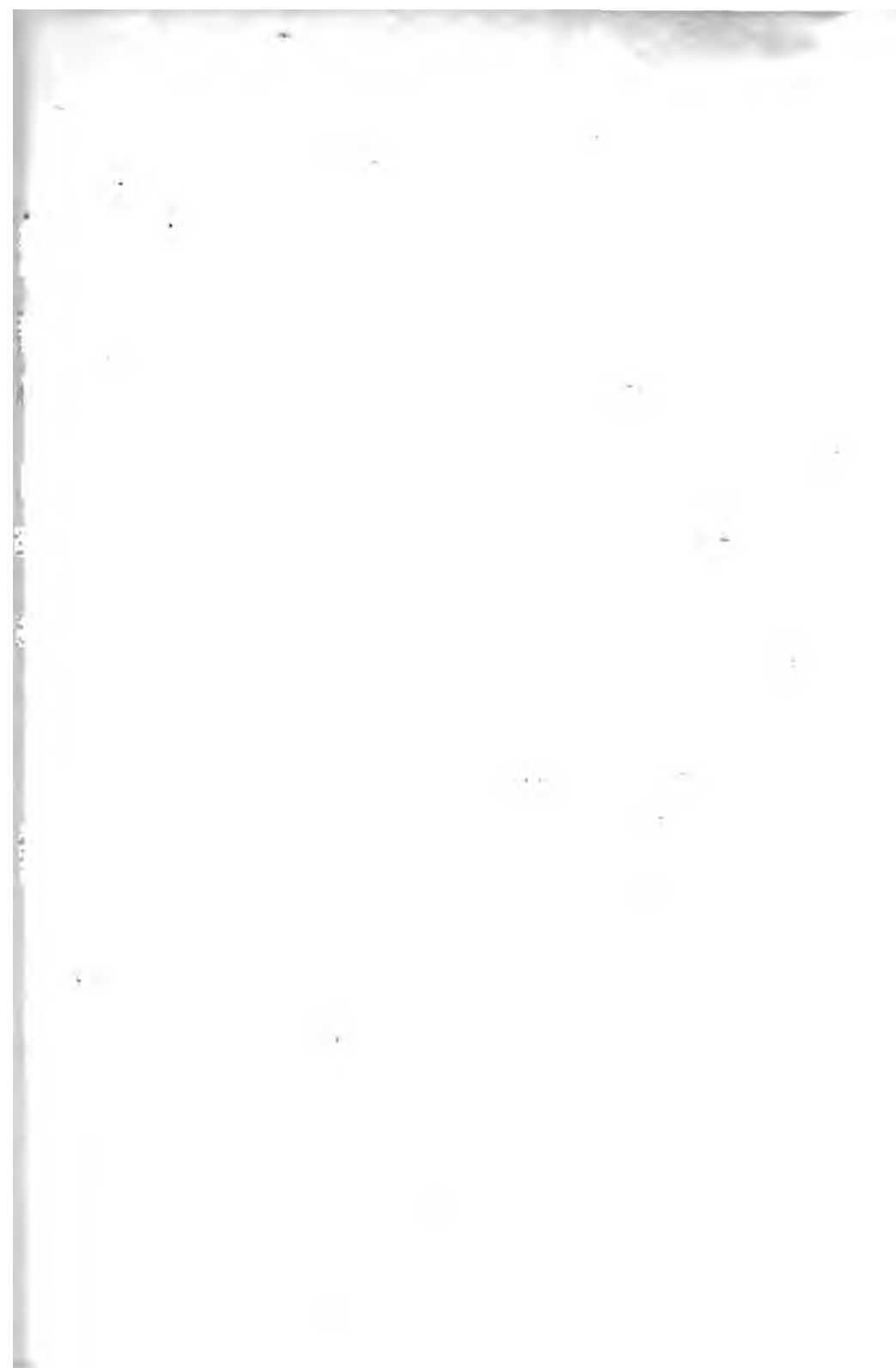
<sup>241</sup> *Madison v. City etc. Ins. Co. L. R.* 1 Com. P. 232; *Bennett v. Maryland Ins. Co.*, 14 Blatchf. (C. C.) 422.

the company may terminate the agency does not imply an agreement that the company cannot terminate the agency until some of the specified grounds exist.<sup>242</sup>

<sup>242</sup> *Stier v. Imperial L. Ins. Co.*, 58 Fed. Rep. 843.



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